DOCKET

o. 83-1035-AFX Title: Tennessee, Appellant
Status: GRANTED v.
Cleamtee Garner, etc., et al.

Docketed: Court: United States Court of Appeals
ecember 21, 1983 for the Sixth Circuit

ide: Counsel for appellant: Cody, W. J. Michael, Klein, Henry L.
83-1070

Counsel for appellee: Winter, Steven L.

ntry	Date	Note	Proceedings and Orders
1	Dec 21 1983	G	Statement as to jurisdiction filed.
2	Jan 12 1984		Supplemental brief of appellant Tennessee filed.
4	Jan 18 1984		Order extending time to file response to jurisdictional statement until February 16, 1984.
5	Feb 7 1984		Order further extending time to file response to jurisdictional statement until February 26, 1984.
6	Feb 28 1984		DISTRIBUTED. March 16, 1984
8	Feb 29 1984	X	Motion of appellee Cleamtee Garner to dismiss or affirm filed. VIDED.
9	Feb 29 1984	G	Motion of Cleamtee Garner for leave to proceed in forma pauperis filed.
12	Mar 19 1984		Motion of Cleamtee Garner for leave to proceed in forma pauperis GRANTED.
13	Mar 19 1984		In No. 83-1035 probable jurisdiction is noted. In No. 83-1070 the petition for writ of certiorari is granted. The cases are consolidated and a total of one hour is allotted for oral argument.
15	Apr 18 1984		Order extending time to file brief of appellant on the merits until June 4, 1984.
16	May 25 1984		Order further extending time to file brief of appellant on the merits until June 8, 1984.
17	Jun 6 1984		Brief of appellant Tennessee filed.
18	Jun 9 1984		Joint appendix filed. VIDED.
20	Jun 26 1984		Order extending time to file brief of appellee on the merits until August 6, 1984.
21	Jun 23 1984		Record filed.
22	Jun 23 1984		Certified copy of joint appendix & C.A. proceedings received. (Box).
23	Aug 9 1984	G	Motion of The Police Foundation, et al. for leave to file a brief as amici curiae filed.
25	Aug 9 1984		Brief of appellees Cleamtee Garner, et al. filed. VIDED.
26	Aug 6 1984		Brief amicus curiae of FL Chapter of the Nat'l. Bar Assn. filed. VIDED.
27	Aug 21 1984		CIRCULATED.
28	Aug 28 1984		SET FOR ARGUMENT. Tuesday, October 30, 1984. This case is consolidated with No. 83-1070. (1st case) (1 hour)
29	Sep 18 1984		Motion of The Police Foundation, et al. for leave to file a brief as amici curiae GRANTED.
30	Sep 24 1984	G	Motion of appellant in No. 83-1035 and petitioners in No. 83-1070 for divided argument filed.
31	Oct 9 1984		Motion of appellant in No. 83-1035 and petitioners in

No. 83-1035-AFH

Entry	Date	Note	Proceedings and Orders
			No. 83-1070 for divided argument GRANTED.
32	Oct 19 1984	X	Reply brief of appellant Tennessee filed.
33	Oct 30 1984		ARGUED.

JURISDICTIONAL

STATEMENT

Office Supreme Court, U.S.
FILED
DEC 21 1983
ALEXANDER L. STEVAS,
CLERK

83-1035

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CLEAMTEE GARNER,
Appellee,

vs.

MEMPHIS POLICE DEPARTMENT and
THE STATE OF TENNESSEE,
ET AL.,
Appellants.

On Appeal from the United States Court of Appeals
for the Sixth Circuit

JURISDICTIONAL STATEMENT

WILLIAM M. LEECH, JR.
Attorney General & Reporter
State of Tennessee

Counsel of Record for the
State of Tennessee
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-6474

JERRY L. SMITH
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-6439

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-6477

QUESTION PRESENTED

Whether Tennessee Code Annotated Sec. 40-7-108 is unconstitutional as repugnant to the Fourth and Fourteenth Amendments to the Constitution of the United States.

TABLE OF CONTENTS

	Page
Question Presented	i
Opinions Below	1
Constitutional Provisions and Statutes	2
Statement of the Case	3
Statement of the Facts	5
The Question Is Substantial	7
Conclusion	11
Appendix:	
A Opinion of the United States Court of Appeals for the Sixth Circuit	A-1
B Order of the United States Court of Appeals denying Petition for Rehearing	A-17
C Notice of Appeal to the Supreme Court of the United States	A-18

TABLE OF AUTHORITIES

Cases:

Ashcroft v. Mattis, 432 U.S. 171 (1977)	9
Beech v. Melancon, 465 F.2d 425 (6th Cir. 1972)	10
Cunningham v. Ellington, 323 F.Supp. 1072 (W.D. Tenn. 1971)	10
Davis v. Murphy, 599 F.2d 1098 (7th Cir. 1977)	8

Garner v. Memphis Police Department, 600 F.2d 52 (6th Cir. 1979) 4

Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970) 8

Johnson v. Glick, 481 F.2d 1028 (2nd Cir. 1973) 8

Jones v. Marshall, 528 F.2d 132 (2nd Cir. 1975) 10

Landrigan v. City of Warwick, 628 F.2d 736 (1st Cir. 1980) 8

Love v. Bass, 145 Tenn. 522, 238 S.W. 94 (1921) 7

Mattis v. Schnarr, 547 F.2d 1007 (8th Cir. 1978) 9,10

Monell v. Department of Social Services, 436 U.S. 658 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) 4

Monroe v. Pope, 365 U.S. 167, 81 S.Ct. 473 (1961) 8

Reneau v. State, 70 Tenn. 720 (1879) 7

State v. Boles, 598 S.W.2d 821 (Tenn. Crim. App. 1980) 7

Wiley v. Memphis Police Department, 548 F.2d 1247 (6th Cir. 1977) 10

Statutes:

28 U.S.C. § 1254(2) 2

28 U.S.C. § 1331 3

28 U.S.C. § 1343(3) 3

28 U.S.C. § 2403(c) 4

42 U.S.C. § 1981 3

42 U.S.C. § 1983 3

42 U.S.C. § 1985 3

42 U.S.C. § 1986 3

42 U.S.C. § 1988 3

Tenn. Code Ann. Sec. 40-7-108 2,4,5,7,9,10

Constitutional Provisions:

United States Constitution, Fourth Amendment 2,4,5,7,8,9

United States Constitution, Fourteenth Amendment .. 2,4,5,7,8,10

Other Authorities:

Ringel, *Searches and Seizures, Arrests and Confessions,* 2d Edition, Sec. 23.7, pp. 23-39 (1982) 7

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CLEAMTEE GARNER,
Appellee,

vs.

MEMPHIS POLICE DEPARTMENT and
THE STATE OF TENNESSEE,
ET AL.,
Appellants.

On Appeal from the United States Court of Appeals
for the Sixth Circuit

JURISDICTIONAL STATEMENT

The State of Tennessee, an appellant herein, appeals from the judgment of the United States Court of Appeals for the Sixth Circuit dated June 16, 1983, and order denying rehearing *en banc* dated September 26, 1983, holding Tennessee Code Annotated Sec. 40-7-108 unconstitutional as repugnent to the Fourth and Fourteenth Amendments to the Constitution of the United States.

OPINIONS BELOW

The opinion of the panel of the United States Court of Appeals for the Sixth Circuit which appears in the appendix hereto, p. A-1, *infra.*, is reported at 710 F.2d 240 (6th Cir. 1983).

The order denying a rehearing *en banc* is not reported, but is reprinted in the appendix hereto, p. A-17, *infra*.

The judgment of the United States Court of Appeals for the Sixth Circuit, holding Tennessee Code Annotated Sec. 40-7-108 unconstitutional, was entered on June 16, 1983. See p. A-1, *infra*. A Suggestion for Rehearing En Banc was entertained and denied on September 26, 1983. See p. A-17, *infra*.

A notice of appeal to this Court was duly filed in the United States Court of Appeals for the Sixth Circuit on October 26, 1983. See p. A-18, *infra*.

This appeal is being docketed in this Court within 90 days from the denial of rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(2).

CONSTITUTIONAL PROVISIONS AND STATUTES

Fourth Amendment, United States Constitution:

> The right of the people to be secure in their persons, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment, Sec. 1, United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Tennessee Code Annotated Sec. 40-7-108:

> **Resistance of officer.** - If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest.

STATEMENT OF THE CASE

This case involves a civil rights action brought by Cleamtee Garner on April 8, 1975, in the United States District Court for the Western District of Tennessee pursuant to 42 U.S.C. §§ 1981, 1983, 1985, 1986 and 1988 and 28 U.S.C. §§ 1343(3) and 1331, seeking redress for the fatal shooting of Mr. Garner's son, Edward Eugene Garner, on October 3, 1974 by an officer of the Memphis Police Department. Named defendants in the lawsuit were the Memphis Police Department; the City of Memphis, Tennessee; Wyeth Chandler, Mayor of the City of Memphis; Jay W. Hubbard, Director of Police for the City of Memphis; and E.R. Hyman, Police Officer of the City of Memphis.

The suit alleges that Officer Hyman violated the consitutional rights of Edward Eugene Garner when Hyman shot and killed Garner in an attempt to apprehend him as Garner fled from the burglary of a private residence at 739 Vollintine, Memphis, Tennessee. The remaining defendants were joined on the grounds that their failure to exercise due care in the hiring, training, and supervision of defendant Hyman made them equally responsible for Garner's death and all defendants were sued on the grounds that their use or authorization to use the "hollow point" bullet further caused the deprivation of Garner's rights under the Constitution and Laws of the United States.

Trial was held on August 2-4, 1976, before the United States District Court for the Western District of Tennessee, the Honorable Harry W. Wellford, Judge, sitting without the intervention of a jury. At the conclusion of the plaintiff's proof on August 4, 1976, the district court granted a directed verdict for defendants Hubbard and Chandler, and a partial directed verdict as to the City of Memphis and the Memphis Police Department with respect to hiring practices.

On September 29, 1976, the district court found in favor of all defendants on all issues. On appeal a panel of the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the district court dismissing the case against the individual defendants. However, the case was remanded as against the City of Memphis for reconsideration in light of this Court's opinion in *Monell* v. *Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). See: *Garner* v. *Memphis Police Department*, 600 F.2d 52 (6th Cir. 1979).

On remand the district court entered an order in favor of the City of Memphis and determined *inter alia* that Tennessee Code Annotated Sec. 40-7-108 was not violative of the cruel and unusual punishment prohibilitions of the Eight Amendment to the Constitution nor did the statute violate the due process provisions of the Fourteenth Amendment to the Constitution. The plaintiff, appellee herein, made no attack on Tennessee Code Annotated Sec. 40-7-108 as being repugnant to the Fourth Amendment to the United States Constitution.

Plaintiff-appellee again appealed to the United States Court of Appeals for the Sixth Circuit. After oral argument of this second appeal the Clerk of the Court of Appeals notified the Office of the Attorney General of Tennessee that Tennessee Code Annotated Sec. 40-7-108 was under constitutional attack. Despite the provisions of 28 U.S.C. § 2403(c) no prior notice of such an attack had been afforded the Office of the Attorney General of Tennessee. Pursuant to 28 U.S.C. § 2403(c) the State of Tennessee, through the Office of the Attorney General, filed a motion to intervene in this case for the purpose of defending the constitutionality of Tennessee Code Annotated Sec. 40-7-108. The United States Court of Appeals for the Sixth Circuit granted the State of Tennessee's motion to intervene and permitted the State to file a brief on the issue.

In an opinion delivered by the Honorable Gilbert S. Merritt in which the Honorable Nathaniel R. Jones and Damon J. Keith concurred, the United States Court of Appeals for the Sixth Circuit determined that Tennessee Code Annotated Sec. 40-7-108 was violative of the Fourth and Fourteenth Amendments to the United States Constitution. Although the plaintiff, appellee herein, had not raised the issue of the constitutionality of Tennessee Code Annotated Sec. 40-7-108 under the Fourth Amendment to the United States Constitution, the panel of the Court of Appeals found that in so far as the statute would permit the use of deadly force against a non-dangerous fleeing felony suspect fleeing a non-violent felony, the statute permitted an unreasonable and excessive seizure of the person. The panel also held that the due process protections of the Fourteenth Amendment prohibit the use of deadly force to apprehend a non-violent fleeing felony suspect. The case was remanded for further proceedings consistent with the opinion.

The State of Tennessee filed a Suggestion for Rehearing En Banc in a timely fashion. Rehearing en banc was denied on September 26, 1983. Notice of Appeal to this Court was filed October 26, 1983.

STATEMENT OF THE FACTS

The relevant facts leading to the institution of this lawsuit may be fairly summarized as follows:

In the nighttime hours of October 3, 1974, Officer E. R. Hyman of the Memphis Police Department and his partner were called to 737 Vollintine in Memphis, Tennessee, the home of a Ms. Daisey Bell Statts. When the officers arrived Ms. Statts told Hyman, "they are breaking in next door." Hyman returned to the patrol car, got his flashlight, advised his partner what was happening, and then proceeded south alongside of the house at 739 Vollintine, the residence being burgled. As Hyman proceeded towards the rear of the house he noticed a light on inside the house. As he approached the southwest corner of the house Hyman heard the back screen door slam and upon turning the corner he saw a figure run from the back of the house to the back of the lot where a cyclone fence enclosed the entire back yard of the property.

There was a three (3) to four (4) foot chicken wire fence supported by boards which ran in along the west side of the backyard and was between Hyman and the cyclone fence. The cyclone fence itself appeared to Hyman to be six (6) to seven (7) feet high. As Officer Hyman was standing at the corner of the residence he could observe a garbage can under a window on the back of the house and the glass broken out of the window. Hyman could also see a clothesline and the outline of various objects in the backyard between him and the fleeing subject.

Officer Hyman shined his flashlight along the fence and spotted Edward Eugene Garner in a stooped position next to the cyclone fence near an outbuilding in the southeast corner of the yard. Garner did not appear to be armed, but Hyman stated at that time he could not be certain. Hyman immediately shouted "halt" and identified himself. Garner paused momentarily and then jumped to the top of the cyclone fence as Hyman started toward him. Hyman fired his service revolver fatally wounding Garner in the right side of the head.

Hyman testified he fired at Garner because he knew once Garner topped the fence he would not be able to otherwise apprehend him. Hyman was unfamiliar with the terrain and the neighborhood in general beyond the fence. Hyman was having difficulty getting through the cluttered backyard, he did not think he could scale the fence due to his size and all the equipment on his person, the area was dark and Hyman was concerned about the possibility of an armed accomplice still in the residence.

Ultimately, following the shooting, it was determined that no one was home at the time of the burglary and that Garner was unarmed. In the burglary Garner had ransacked the bedrooms and removed a ring and a wallet containing a small amount of cash.

THE QUESTION IS SUBSTANTIAL

In the instant case the Sixth Circuit Court of Appeals has held that the Fourth and Fourteenth Amendments require not only probable cause by police to arrest a felony suspect, but also probable cause to believe the suspect is dangerous, or has committed a violent felony before deadly force may be used to capture the suspect, although the application of deadly force is necessary if the suspect is to be apprehended. By holding unconsitutional Tennessee Code Annotated § 40-7-108 which does not impose such a requirement on the use of deadly force, to effect an arrest for a felony, the holding of the Court of Appeals calls into question similar laws in some twenty-four (24) states. The holding places burdensome and impractical constraints on effective law enforcement by police who can rarely know in emergency situations involving a fleeing felony suspect the degree of danger the suspect poses to police or the citizenry if he or she is not apprehended. The decision is a novel one, being a significant departure from former law, and presents a substantial question due to its impact on the area of law enforcement.

Tennessee Code Annotated § 40-7-108 permits police officers to use whatever force is necessary to effect the arrest of a suspect when police have probable cause to believe the suspect has committed a felony. The statute is a codification of the commonlaw rule which appears to be the law in approximately twenty-four (24) states. Ringel, *Searches and Seizures, Arrests and Confessions*, 2d Edition, Sec. 23.7, p. 23-39, (1982). The statute has been interpreted to permit an officer to use deadly force as a last resort to effect a lawful arrest when no other means of apprehension is available; but if the deadly force is unreasonably excessive to effect the capture of the suspect then the officer may be subject to criminal liability. See: *Reneau* v. *State*, 70 Tenn. 720 (1879); *Love* v. *Bass*, 145 Tenn. 522, 238 S.W. 94 (1921); *State* v. *Boles*, 598 S.W.2d 821, 823 (Tenn. Crim. App. 1980). The use of force beyond what is reasonably necessary to apprehend a fleeing suspect may also be a constitu-

tional deprivation under the Fourth Amendment as made applicable to the states by the due process clause of the Fourteenth Amendment. *Monroe* v. *Pape*, 365 U.S. 167, 81 S.Ct. 473 (1961); *Landrigan* v. *City of Warwick*, 628 F.2d 736, 742 (1st Cir. 1980); *Davis* v. *Murphy*, 599 F.2d 1098, 1102 (7th Cir. 1977); *Johnson* v. *Glick*, 481 F.2d 1028 (2nd Cir. 1973). However, until the decision of the Court of Appeals in the instant case, it appears no court has held that the Fourth Amendment proscribes the use of deadly force against non-dangerous felony suspects even if such force is a necessity to effect their capture.

The opinion of the Court of Appeals in the instant case indicates that the case of *Jenkins* v. *Averett*, 424 F.2d 1228 (4th Cir. 1970); holds the Fourth Amendment limits the use of deadly force to capture a fleeing felony suspect. This is true, however *Jenkins* is not precedent for the appellate court's holding. In *Jenkins* the fleeing suspect was unreasonably seized within the meaning of the Fourth Amendment for two (2) reasons. First the opinion indicates officers had no probable cause to interfere with Jenkins' freedom of movement at all and thus had no lawful right to arrest him using any level of force. Secondly, the use of deadly force to capture Jenkins was both reckless and excessive because it was apparently not necessary to capture him. Thus, *Jenkins* does not deal with the situation presented in the instant case, i.e. a fleeing suspect whom officers have probable cause to believe has committed a felony, and who cannot be apprehended other than through the use of a deadly force.

The appellant respectfully submits the Fourth Amendment does not proscribe the use of deadly force as a necessary last resort to capture a suspect whom police have probable cause to believe has committed a felony. Once probable cause to arrest a citizen has been established he is virtually powerless to prevent some police action to effect the arrest. Thus, the prohibition of unreasonable seizures should stand as a guard to protect the citizen from police use of force against him beyond what is

necessary to carry out the arrest. However, the Fourth Amendment should not be read to prohibit the use of deadly force against a citizen whom police may lawfully arrest for a felony when the citizen himself is responsible for creating the necessity of using such force by refusing to submit to a lawful arrest, or by resistance to lesser applications of force to effect the arrest.

The only case, apart from the one *sub judice*, of which the appellant is aware that has stricken as unconstitutional a statute similar to Tennessee Code Annotated Sec. 40-7-108 is *Morris* v. *Schnurr*, 547 F.2d 1007 (8th Cir. 1978), vacated as moot per curiam sub nom *Ashcroft* v. *Morris*, 432 U.s. 171 (1977). There, by a single vote in an *en banc* hearing the Eighth Circuit held a Missouri statute similar to Tennessee Code Annotated Sec. 40-7-108 to be violative of the due process clause of the Fourteenth Amendment in so far as it would permit the use of deadly force against fleeing felony suspects who were ultimately determined to be non-dangerous. The rationale of the decision being the court's determination that the state's interest in apprehending the suspect was only compelling, vis-a-vis the suspect's constitutional right to life, when the suspect was dangerous to officers or other citizens. In a strongly worded, well-reasoned dissent three (3) judges of the Eighth Circuit found the question of when deadly force should be applied was one of public policy that should be entrusted to the legislature, and not made a rule of constitutional magnitude. The dissent also pointed out that such a rule of constitutional law placed extraordinary burdens on police who would be forced into "on-the-spot constitutional analysis" in emergency situations calling for split-second decisions. 547 F.2d at 1023. It should be noted that this Court vacated the judgment in *Morris* v. *Schnurr*, *supra*., as nothing more than an advisory opinion and therefore moot. See: *Ashcroft* v. *Morris*, *supra*. Therefore *Morris* v. *Schnurr*, *supra*., is of only limited, if any, precedential value.

The Sixth Circuit Court of Appeals, when confronted with the question of the constitutionality of Tenn. Code Annotated

Sec. 40-7-108 [formerly § 40-808], in 1977 held the statute to be constitutional. In *Wiley* v. *Memphis Police Department*, 548 F.2d 1247 (6th Cir. 1977); the Sixth Circuit roundly criticized the holding in *Mattis* v. *Schnarr*, supra., as extending unwarranted protection to the felon at the expense of the unprotected public. 548 F.2d at 1252. See also: *Beech* v. *Melancon*, 465 F.2d 425 (6th Cir. 1972); and *Cunningham* v. *Ellington*, 323 F.Supp. 1072 (W.D. Tenn. 1971) (Three-judge court); both upholding constitutionality of Tennessee Code Annotated § 40-7-108. Not until the instant case did the Sixth Circuit retreat from its previous holdings that Tennessee Code Annotated § 40-7-108 was constitutional under the due process clause of the Fourteenth Amendment.

The Second Circuit has held that the common law rule affording a privilege to a police officer to use deadly force if an actual necessity to apprehend a fleeing felony suspect is not violative of due process under the Fourteenth Amendment. *Jones* v. *Marshall*, 528 F.2d 132 (2nd Cir. 1975). Although expressing the belief that the privilege to use deadly force should as a matter of policy be restricted to situations where there is a violent crime of the fleeing suspect poses a serious threat of danger, the court in *Jones* declined to elevate this belief to a constitutional mandate. Instead the court held the policy decision should properly be reserved for the legislatures in view of the history of the common-law rule, the ready availability of weapons, the widespread presence of violence, and the needs of law enforcement. 528 F.2d at 140.

The appellant herein, the State of Tennessee, therefore asserts that the decision of the Court of Appeals in the instant case is a novel and substantial departure from the former law. The decision extends, as a matter of constitutional law, unwarranted protection to the felon at the expense of the public and the public's interest in effective law enforcement.

CONCLUSION

For the reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

WILLIAM M. LEECH, JR.
Attorney General of Tennessee
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-6474

Counsel of Record for the
State of Tennessee

JERRY L. SMITH
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-6439

APPENDIX

APPENDIX A

No. 81-5605

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

Cleamtee Garner,
Plaintiff-Appellant,

v.

Memphis Police Department, et al.,
Defendants-Appellees.

On Appeal from the United States District Court

Decided and Filed June 16, 1983

Before: Edwards, Chief Judge; Keith and Merritt, Circuit Judges.

MERRITT, Circuit Judge. The principal question before us concerns the constitutionality of Tennessee's fleeing felon statute, T.C.A. §40-808 (1975) under the Fourth, Eighth and Fourteenth Amendments. The Tennessee statute, as interpreted by the District Court and by other federal and state courts, authorizes police officers to use deadly force in order to capture unarmed suspects fleeing from nonviolent felonies. The statute reads: "If . . . the defendant . . . either flee or forcibly resist, the officer may use all the necessary means to effect the arrest." In the present action for wrongful death under 42 U.S.C. §1983 (1976), a Memphis police officer shot an unarmed boy fleeing from the burglary of an unoccupied house. We hold the Tennessee statute unconstitutional because it authorizes unnecessarily severe and excessive, and therefore unreasonable,

methods of seizure of the person under the Fourth and Fourteenth Amendments.

I.

On the night of October 3, 1974, a fifteen year old, unarmed boy broke a window and entered an unoccupied residence in suburban Memphis to steal money and property. Two police officers, called to the scene by a neighbor, intercepted the youth as he ran from the back of the house to a six foot cyclone fence in the back yard. After shining a flashlight on the boy as he crouched by the fence, the officer identified himself as a policeman and yelled "Halt." He could see that the fleeing felon was a youth and was apparently unarmed. As the boy jumped to get over the fence, the officer fired at the upper part of the body, using a 38-calibre pistol loaded with hollow point bullets, as he was trained to do by his superiors at the Memphis Police Department. He shot because he believed the boy would elude capture in the dark once he was over the fence. The officer was taught that it was proper under Tennessee law to kill a fleeing felon rather than run the risk of allowing him to escape. The youth died of the gunshot wound. On his person was ten dollars worth of money and jewelry he had taken from the house.

The District Court dismissed the suit brought by decedent's father against the City under 42 U.S.C. § 1983 (1976) to recover damages for wrongful death caused by claimed constitutional violations of the Fourth, Eighth and Fourteenth Amendments. In accordance with *Monroe* v. *Pape*, 364 U.S. 167 (1961), the District Court held that a city is not a "person" subject to suit under § 1983. Before we heard the first appeal, *Monroe* was overruled on this point by *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978). The District Court also dismissed the case against the officer and his superiors holding, in accordance with our decisions in *Beech* v. *Melancon*, 465 F.2d 425 (6th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973); Qualls v. *Parrish*, 534 F.2d 690 (6th Cir. 1976); and *Wiley* v. *Memphis Police Department*, 548 F.2d 1247 (6th Cir.), *cert. denied*, 434 U.S. 822 (1977), that the officers acted in good faith reliance on Tennessee law which allows an officer to kill a fleeing felon rather than run the risk of allowing him to escape apprehension.

On appeal, a panel of this Court consisting of Chief Judge Edwards and Judges Lively and Merritt affirmed the District Court's holding that the individual defendants were protected by the doctrine of qualified immunity because they acted in good faith reliance on T.C.A. § 40-808. *Garner* v. *City of Memphis*, 600 F.2d 52 (6th Cir. 1972). We reversed and remanded the case against the City of Memphis, however, for reconsideration by the District Court in light of *Monell* v. *Department of Social Services*, *supra*. Because *Monell* held that a city may be liable in damages under § 1983 for constitutional deprivations that result from a "policy or custom" followed by the city, 436 U.S. at 694 and n.66, we instructed the District Court to consider the following questions:

1. Whether a municipality has qualified immunity or privilege based on good faith under *Monell*?

2. If not, is a municipality's use of deadly force under Tennessee law to capture allegedly nondangerous felons fleeing from nonviolent crimes constitutionally permissible under the Fourth, Sixth, Eighth and Fourteenth Amendments?

3. Is the municipality's use of hollow point bullets constitutionally permissible under these provisions of the Constitution?

4. If the municipal conduct in any of these respects violates the Constitution, did the conduct flow from a "policy or custom" for which the City is liable in damages under *Monell*?

600 F.2d 52, at 54-55.

On remand, Judge Wellford ordered memoranda and oral argument on the issue of whether the trial should be re-opened. By order dated February 29, 1980, he denied further hearings and dismissed the case on the merits, holding that the constitutional claims had already been fully adjudicated. Because there had been no constitutional violation, the holding of *Monell* that cities could be liable for violations occurring pursuant to a policy or custom of the city did not require a different result. Plaintiff's motion for reconsideration was granted and he was allowed to submit further briefs and make an offer of proof. The Judge considered the offer of proof and once again ruled against plaintiffs in a written opinion dated July 8, 1981. He held that the wisdom of a statute permitting the use of deadly force against all fleeing felons was a matter of policy for the legislature rather than the judiciary, and that the Tennessee statute was not unconstitutional on its face, nor as applied by the police officer in this case.

Addressing the question of the City's good faith immunity, the District Court held that *Owen* v. *City of Independence*, 445 U.S. 622 (1980), prevented the city from claiming immunity from liability based on the good faith of its agent. Nevertheless, it found that it was still an open question whether the City might claim immunity if the City itself was relying in good faith on the Tennesse law as interpreted by the federal and state courts. Judge Wellford did not believe it necessary to address the constitutionality of the use of hollow point bullets, because he found that there was no causal connection between the use of hollow point bullets and Garner's death.

II.

We consider the Fourth Amendment question first because, unlike the other more general constitutional provisions raised, the Fourth Amendment is specifically directed to methods of arrest and seizure of the person. The question under the Fourth Amendment is one of first impression in this Circuit. The narrow question presented is whether a state law authorizing the killing of an unarmed, nonviolent fleeing felon by police in order to prevent escape, constitutes an unreasonable seizure of the person.

The Fourth Amendment provides for the "right of the people to be secure in their persons ... against unreasonable ... seizures." The Amendment also provides that where a warrant is necessary it must describe "the person to be seized." When an officer "accosts an individual and restrains his freedom to walk away," the Fourth Amendment comes into play. *Terry* v. *Ohio*, 392 U.S. 1, 16 (1968). "[A] person is 'seized' ... when, by means of physical force or a show of authority, his freedom of movement is restrained." *United States* v. *Mendenhall*, 446 U.S. 544, 553 (1980). Killing the individual is the most decisive way to make sure that he does not "walk away," a method "unique in its severity and irrevocability." *Gregg* v. *Georgia*, 428 U.S. 153, 187 (1976). It is plainly a "seizure" of the "person." The question therefore becomes whether this method of capturing suspects is "reasonable" under the Fourth Amendment.

Tennessee courts have interpreted their statute regarding the capture of fleeing felons to create a jury question on the issue of the "reasonableness" and the "necessity" of using deadly force. But the "reasonableness" and "necessity" of the officer's action must be judged solely on the basis of whether the officer could have arrested the suspect without shooting him. Purporting to follow the rule developed in England at common law allowing the use of deadly force against suspects fleeing from any felony, Tennessee courts have interpreted their statute to mean that once it is determined that the officer probably could not have captured the person without firing, the jury should find the police action reasonable under the statute. *Scarbrough* v. *State*, 168 Tenn. 106, 110 (1934) (officer may kill automobile thief "as a last resort" to prevent escape and the question of "necessity of killing" is one for jury); see also to the

same effect *Love* v. *Bass*, 143 Tenn. 522 (1921) and *State* v. *Bowles*, 598 S.W.2d 821 (Tenn. App. 1980) and the cases cited in those opinions. It makes no difference that the felony was nonviolent or that the felon was unarmed and not dangerous to the physical safety of others.

It is true that the common law permitted the killing of a felon who resists arrest without regard to the nature of the felony. But it did so at a time when all of the small number of felonies then in existence were capital crimes. Since any felon at large would be hanged or otherwise executed if taken and tried, he was an "outlaw" who was automatically dangerous and posed an imminent threat to the physical safety of others. The common law, however, prohibited the use of deadly force against a fleeing suspect whose crime did not require execution and who, therefore, was not likely to become a dangerous outlaw.

Pollock and Maitland describe as follows the felony at common law and the method by which a felon could be taken:

> But the very ease with which the king's peace spread itself until it had become an all-embracing atmosphere prevented a mere breach of that peace from being permanently conceived as a crime of the highest order. . . . It was otherwise with *felony*. This becomes and remains a name for the worst, the bootless crimes.
>
> . . . .
>
> The specific effect of the 'words of felony' when they were first uttered by appellors, who were bringing charges of homicide, robbery, rape and so forth, was to provide that, whatever other punishment the appellees might undergo, they should in all events lose their land. . . . At all events this word, expressive to the common ear of all that was post hateful to God and man, was soon in England and Normandy a general name for the worst, the utterly 'bootless' crimes. . . . The felon's lands go to his lord or to

> the King and his chattels are confiscated. The felon forfeits life or member. If a man accused of felony flies, he can be outlawed.
>
> . . . .
>
> We have now to speak of the various processes which the law employs in order to compel men to come before its courts. They vary in stringency from the polite summons to the decree of outlawry. . . .
>
> When a felony is committed the hue and cry should be raised. . . . The neighbors should turn out with the bows, arrows, knives, that they are bound to keep and, besides much shouting, there will be hornblowing; the 'hue' will be 'horned' from vale to ville.
>
> Now if a man is overtaken by hue and cry while he has still about him the signs of his crime, he will have short shrift. Should he make any resistance, he will be cut down.
>
> . . . .
>
> There is hardly room for doubt that this process had its origin in days when the criminal taken in the act was *ipso facto* an outlaw. He is not entitled to any 'law,' not even to that sort of 'law' which we allow to noble beasts of the chase. Even when the process is being brought within some legal control, this old idea survives. If there must be talk of proof, what has to be proved is not that this man is guilty of a murder, but that he was taken red-handed by hue and cry.

II Pollock and Maitland, History of English Law, 464-466, 578-80 (2d ed. 1959).

It is this common law rule allowing all fleeing felons to be killed, a rule based on the ancient concept of outlawry, that Tennessee courts have adopted in interpreting their statute. These killings were acceptable at common law because only violent

crimes were classified as felonies, and all were punishable by death and subject to outlawry. The killing of a fleeing felon merely accelerated the time of punishment. The rule of outlawry permitting the killing of the fleeing felon did not apply to misdemeanors and lesser crimes. Lesser criminals who took flight from their crimes could not be killed to prevent their escape. *See* Comment, *Deadly Force to Arrest: Triggering Constitutional Review*, 11 Harv. C.R.-C.L. L. Rev. 361, 364-65 (1976).

It is inconsistent with the rationale of the common law to permit the killing of a fleeing suspect who has not committed a life endangering or other capital offense and who we cannot say is likely to become a danger to the community if he eludes immediate capture. Those states like Tennessee that cite the common law in defense of their rule permitting the killing of any fleeing felony suspect exalt the form of the common law rule over its substance and purpose. Tennessee law authorizing the use of deadly force against all fleeing felons is at odds with the purpose and function of the common law principle because there are now hundreds of state and federal felonies that range all the way from violations of tax, securities and antitrust laws and the possession of stolen or fraudulently obtained property to murder and crimes of terror. A state statute or rule that makes no distinctions based on the type of offense or the risk of danger to the community is inherently suspect because it permits an unnecessarily severe and excessive police response that is out of proportion to the danger to the community.

This line of reasoning concerning the origin, development and current status of the common law rule is similar to the reasoning of the Eighth Circuit in its *en banc* decision in *Mattis v. Schnarr*, 547 F.2d 1007 (8th Cir. 1976), *vacated as moot per curiam sub nom Ashcroft v. Mattis*, 431 U.S. 171 (1977). There the court held a similar state statute in Missouri unconstitutional under the Fourteenth Amendment as a matter of substantive due process. After tracing some of the history of the fleeing felon doctrine and cataloguing in comprehensive fashion the

state statutes on the question as well as federal decisions, administrative rules and scholarly commentary, the Eighth Circuit observed that "the historical basis for permitting the use of deadly force by law enforcement officers against nonviolent fleeing felons has been substantially eroded," 547 F.2d at 1016. At common law "since all felonies ... were punishable by death, the use of deadly force was seen as merely accelerating the penal process. ..." 547 F.2d at 1011 n.7.

Likewise, in *Jones v. Marshall*, 528 F.2d 132 (2d Cir. 1975), the Second Circuit in a scholarly opinion by Judge Oakes observed that a rule which permits the use of deadly force against nonviolent fleeing felons is not consistent with the purpose and function of the common law rule. Although the *Jones* case, like our earlier opinion in this case, insulates the officer from federal liability when, in reliance on a similar state statute, he shoots a nonviolent fleeing felon, the court commented:

> [T]he common law rule evolved when only a few crimes were felonies, and all of them involved force or violence ... and were punishable by death or forfeiture of lands and goods. *See* A.L.I., Model Penal Code § 3.07, Comment 3 at 56 (Tent. Draft No. 8, 1958). ("Such rational justification for the common law rule as can be adduced rests largely on the fact that virtually all felonies in the common law period were punishable by death"). ... As the scope of "felony" crimes has expanded wholly away from the concept of violence which underlay its common law origin, the use of the felony label to justify especially severe police behavior has become increasingly strained. As stated by Judge McCree in his concurring opinion in *Beech v. Melancon*, 465 F.2d 425, 426-27 (5th Cir. 1972), *cert. denied*, 409 U.S. 114 (1973):
>
> "... I would find it difficult to uphold as constitutional a statute that allowed police officers to shoot, after an unheeded warning to halt, a fleeing income tax evader, an-

> ...arrest law violator, selective service delinquent, or other person whose arrest might be sought for the commission of any one of a variety of other felonies of a type not normally involving danger of death or serious bodily harm."

We have thoroughly explored the digests and the electronic case retrieval systems, and our research discloses only one appellate decision discussing Fourth Amendment limitations on the use of deadly force to capture a fleeing suspect. In *Jenkins* v. *Averett*, 424 F.2d 1228 (4th Cir. 1970), a black youth took flight at night. The police officer cornered the boy and shot him. The District Court dismissed the federal constitutional claim. Applying the Fourth Amendment analysis, the Fourth Circuit, in an opinion by Judge Sobeloff reversed. Holding that the Fourth Amendment "shield covers the individual's physical integrity," the Court found a constitutional violation because "our plaintiff was subject to the reckless use of excessive force." 424 F.2d at 1232.

The only other discussion of the reasonableness of the use of deadly force by police in a Fourth Amendment context is that of Chief Justice Burger in his dissenting opinion in *Bivens* v. *Six Unknown Federal Narcotic Agents*, 403 U.S. 388 (1971). In *Bivens* the Court held that the Fourth Amendment creates a direct constitutional tort claim for violation of a citizen's right to be free of illegal searches of the home and seizures of the person. Although *Bivens* was not a fleeing felon case, Chief Justice Burger, in the course of his Fourth Amendment analysis in dissent, observed:

> I wonder what would be the judicial response to a police order authorizing 'shoot to kill' with respect to every fugitive. It is easy to predict our collective wrath and outrage. We, in common with all rational minds, would say that the police response must relate to the gravity and need; that a 'shoot' order might conceivably be tolerable to prevent the escape of a convicted killer but surely not for

> car thieves, pickpockets or a shoplifter. *Bivens* v. *Six Unknown Agents*, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting) (emphasis added).

The Sixth Circuit long ago in *United States* v. *Clark*, 31 F. 710 (6th Cir. 1887), expressed similar doubts about the validity of a rule allowing deadly force against all fleeing felony suspects:

> Suppose, for example, a person were arrested for petit larceny, which is a felony at the common law, might an officer under any circumstances be justified in killing him? I think not. The punishment is altogether too disproportionate to the magnitude of the offense.

Id. at 713.

The Tennessee statute in question here is invalid because it does not put sufficient limits on the use of deadly force. It is "too disproportionate." It does not make distinctions based on "gravity and need" nor on "the magnitude of the offense." Before taking the drastic measure of using deadly force as a last resort against a fleeing suspect, officers should have probable cause to believe not simply that the suspect has committed some felony. They should have probable cause also to believe that the suspect poses a threat to the safety of the officers or a danger to the community if left at large. The officers may be justified in using deadly force if the suspect has committed a violent crime or if they have probable cause to believe that he is armed or that he will endanger the physical safety of others if not captured. A statute which allows officers to kill any unarmed fleeing felon does not meet this standard and is therefore invalid.

After oral argument in this case, upon motion, the Court permitted the state of Tennessee, through its Attorney General, William M. Leach, Jr., to intervene as a party under 28 U.S.C. §2403(c) for the purpose of defending the constitutionality of T.C.A. § 40-7-108. The State has filed an able brief. It concedes that Tennessee courts and law enforcement agencies interpret

the statute to permit the use of deadly force against any fleeing felon, whatever the felony, "when no lesser means of apprehension reasonably appears available." (Brief p. 5) The State's brief argues, however, that we should not reach the issue of whether Tennessee's rule may be constitutionally applied to a non-dangerous felon fleeing from a non-violent felony because here the officer "could not be certain whether there was an accomplice in the burglarized house, or in the area, and whether the accomplice might be armed." (Brief, p. 6.)

This argument almost always permits the officer to shoot to kill. The officer will seldom be absolutely certain of the situation. The Fourth Amendment resolves this problem, however. It requires probable cause—an objective, reasonable basis in fact to believe that the felon is dangerous or has committed a violent crime. There is no evidence to support such a finding in this case, although a the state argues, and as the District Court found, the officer was not certain on this point. The officer knew only that he was dealing with a youth who had committed a non-violent felony and was *apparently* unarmed. We do not have to hold the District Judge's findings clearly erroneous in order to reach this result, because the facts, as found, did not justify the use of deadly force under the Fourth Amendment.

An analysis of the facts of this case under the Due Process Clause of the Fourteenth Amendment leads us to a similar result. That clause prohibits any State from depriving "any person of life, liberty or property, without due process of law." U.S. Const. Amend. XIV. The right to life, expressly protected by the Constitution, has been recognized repeatedly by the Supreme Court as fundamental in the due process and equal protection contexts. *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886) (the fundamental rights "to life, liberty and the pursuit of happiness"); *Johnson* v. *Zerbst*, 304 U.S. 458, 462 (1938) ("the fundamental human rights of life and liberty"); *Roe* v. *Wade*, 410 U.S. 113 (1973) (right to life protected by Fourteenth Amendment when fetus becomes viable).

When a fundamental right is involved, due process requires a state to justify any action affecting that right by demonstrating a compelling state interest. *Roe* v. *Wade, supra; Mattis* v. *Schnarr*, 547 F.2d 1007, 1019 (8th Cir. 1976) (en banc). Laws which infringe on fundamental rights must be "narrowly drawn to express only the legitimate state interests at stake." *Roe* v. *Wade, supra*. The law challenge here is not so narrowly drawn. Certainly there are state interests in law enforcement served by this law which allow police to shoot all fleeing felons. Those interests are compelling when the fleeing felon poses a danger to the safety of others. We do not consider these interests sufficiently compelling to justify the use of deadly force to protect only property rights.

As the Eighth Circuit pointed out in striking down a similar law:

> We find nothing in this record ... to support the contention of the state that statutes as broad as these deter crime, insure public safety or protect life. Felonies are infinite in their complexity, ranging from the violent to the victimless. The police officer cannot be constitutionally vested with the power and authority to kill any and all escaping felons, including the thief who steals an ear of corn, as well as one who kills and ravishes at will.

Mattis v. *Schnarr, supra* at 1019-20 (footnote omitted). Where, as here, human life is the right at stake, a statute that sweeps as broadly as this one violates due process of law and must be struck down.

The principles and distinctions we have enunciated here have been cast in the form of a rule by the American Law Institute in the Model Penal Code, a rule which accurately states Fourth Amendment limitations on the use of deadly force against fleeing felons:

> The use of deadly force is not justifiable ... unless (i) the arrest is for a felony, and (ii) the person effecting the arrest

> is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer; and (iii) the actor believes that the force employed creates no substantial risk of injury to innocent persons; and (iv) the actor believes that (1) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or (2) there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.

Model Penal Code § 3.07(2)(b) (Proposed Official Draft, 1962).

Our holding here under the Fourth Amendment is not inconsistent with our holdings in *Wiley* v. *Memphis Police Department*, 548 F.2d 1247 (6th Cir. 1977), and *Beech* v. *Melancon*, 465 F.2d 425 (6th Cir. 1972), or the three judge District Court opinion in *Cunningham* v. *Ellington*, 323 F.Supp. 1072 (W.D. Tenn. 1971), in all of which youths were killed by the Memphis police while fleeing from the commission of a burglary. In each of those cases the Tennessee statute was drawn into question under the "cruel and unusual punishment" clause of the Eighth Amendment and under the Fourteenth Amendment as a matter of substantive due process. In none of these cases was a Fourth Amendment question raised, discussed, mentioned or decided. Fourth Amendment considerations were not argued. Moreover, in each of the cases the narrow question before the court was whether the police officer who shot the fleeing boy was entitled to a good faith privilege against liability based upon his reliance upon the Tennessee statute. In each case the court held, just as we held in our previous decision in this case, *Garner* v. *City of Memphis*, *supra*, that the officer is insulated from personal liability by a good faith privilege which entitles him to rely upon the Tennessee statute. This is the *ratio decidendi* of each of those cases. In those cases it was unnecessary to reach the constitutionality of the statute in order to decide the question of the officers' immunity, and in any event, no Fourth Amendment question was raised in any of the cases.

III.

In his opinion of July 8, 1981, Judge Wellford held that although *Owen* v. *City of Independence*, 445 U.S. 622 (1980), precludes the city of Memphis from claiming immunity based on the good faith of its police officers, that opinion left open the question of whether the City could claim immunity for its good faith reliance on a facially valid state law in enacting City police regulations. Because he found no violation of Garner's constitutional rights, the Judge did not have to answer this question. In light of our finding of a constitutional violation, we must reach this question; in doing so, we hold that there is no good faith immunity for municipalities under § 1983.

The reasoning underlying the Supreme Court's decision in *Owen*, *supra*, precludes a municipality's claim of good faith immunity under § 1983 altogether. Justice Brennan, speaking for the Court in *Owen*, gave two major reasons why good faith immunity of city officials should not be extended to municipalities themselves. First he pointed out that at common law, which is the source of immunities under § 1983, there was no good faith immunity for governmental entities. *Id.* at 640. Sovereign immunity at common law was unrelated to the question of good faith and was waived when the government consented to suit as it does under § 1983. Immunity for discretionary functions, the only other governmental immunity at common law, involved concerns of separation of powers, unrelated to good faith. Because a municipality has no "discretion" to violate constitutional rights of its citizens, this traditional form of immunity does not come into play. There is no common law analogue which would suggest that municipalities have immunity for good faith reliance on state law under § 1983.

Second, Justice Brennan discussed the public policy considerations which justify individual good faith immunity and found that they did not weigh heavily in favor of governmental immunity. The two considerations are (1) the injustice of forc-

ing an individual whose position requires him to exercise discretion to bear the cost of his good faith reliance on a law or regulation; and (2) the danger that the threat of liability would deter individuals from executing the duties of their offices or even from seeking public office. *Id.* at 654. When a municipality is held liable, whether for the actions of its officials, or based on its own reliance on state law, no single individual or official must bear the cost. The cost is spread among the general public, which is ultimately responsible for the conduct of its officials. There is little danger that individuals will hesitate to carry out their duties or accept public office, when any liability for their reliance on state law will be paid from the public fisc.

In a well-reasoned opinion, the Tenth Circuit sitting *en banc*, held that good faith reliance by a school district on the prior law of the circuit provided no independent protection from liability for wrongful dismissal of a teacher. *Bertot* v. *School District No. 1, Albany County*, 613 F.2d 245, 251 (10th Cir. 1979). It held that the remedying of deprivations of fundamental constitutional rights must be of primary concern to courts and other governmental bodies. A rule imposing liability despite good faith reliance insures that if governmental officials err, they will do so on the side of protecting constitutional rights. It also serves the desirable goal of spreading the cost of unconstitutional governmental conduct among the taxpayers who are ultimately responsible for it. *Id.* 252.

Neither the District Judge nor the City of Memphis has offered any reason why the courts should expand the doctrine of good faith immunity under § 1983. The considerations which prompted the Supreme Court in *Owen* to deny good faith immunity to municipalities for the acts of their officials apply with equal force to this case.

Accordingly, the judgment of the District Court is reversed and the case remanded for further proceedings consistent with this opinion.

APPENDIX B

No. 81-5605

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Cleamor Garner,
Plaintiff-Appellant

v.

Memphis Police Department,
et al.,
Defendants-Appellees

ORDER DENYING PETITION FOR REHEARING EN BANC

(Filed Sept. 26, 1983)

Before: EDWARDS, Chief Judge; KEITH and MERRITT, Circuit Judges

A majority of the Court having not voted in favor of an en banc rehearing, the petitions for rehearing have been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petitions for rehearing be and hereby are denied.

ENTERED BY ORDER OF
THE COURT

/s/ John P. Hehman
Clerk

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 81-5605

Cleamtee Garner,
Plaintiff-Appellant,

v.

Memphis Police Department,
and The State Of Tennessee,
et al.,
Defendants-Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed Oct. 26, 1983)

Notice is hereby given that the State of Tennessee, a defendant-appellee above-named, hereby appeals to the Supreme Court of the United States from the judgment of this Court entered June 16, 1983, and the denial of a rehearing en banc entered in this case on September 26, 1983, making the judgment of June 16, 1983 final.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

/s/ JERRY L. SMITH
Assistant Attorney General

PROOF OF SERVICE

I, Jerry L. Smith, Assistant Attorney General of the State of Tennessee, having been duly sworn hereby affirm that all parties required by the United States Supreme Court Rules to be served with the foregoing notice of appeal have been served in accordance with Rule 28 of the United States Supreme Court Rules by depositing copies of the foregoing notice of appeal in the United States Mail, first-class postage prepaid, to each of the following:

Messrs. Jack Greenberg, James M. Nabrit, III and Steven L. Winter, Counsel for Plaintiff-Appellant,
Suite 2030
10 Columbus Circle
New York, New York 10019

Mr. Walter L. Bailey, Jr
Counsel for Plaintiff-Appellant,
Suite 901, Tenoke Building
161 Jefferson Avenue
Memphis, Tennessee 38103

Mr. Henry L. Klein,
Counsel for Defendant-Appellee,
The City of Memphis,
2108 First Tennessee Building
Memphis, Tennessee 38103

This the day of October, 1983.

/s/ JERRY L. SMITH
Assistant Attorney General

STATE OF TENNESSEE

COUNTY OF DAVIDSON

Sworn to and subscribed before me this 25th day of October, 1983.

/s/ Jacqueline B. Epps — July 21, 1983

NOTARY PUBLIC — MY COMMISSION EXPIRES

SUPPLEMENTAL APPENDIX

Office - Supreme Court, U.S.
FILED
JUL 12 1984
CLERK

No. 83-1035

In The

Supreme Court of the United States

October Term, 1983

The State Of Tennessee,
Appellant,

vs.

Cleamtee Garner,
Appellee.

On Appeal from the United States Court of Appeals
for the Sixth Circuit

SUPPLEMENTARY APPENDIX

William M. Leech, Jr.
Attorney General & Reporter
State of Tennessee

Counsel of Record for the
State of Tennessee
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-6474

Jerry L. Smith
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-6439

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

BEST AVAILABLE COPY

No. 83-1035

In The

Supreme Court of the United States

October Term, 1983

The State Of Tennessee,
Appellant,

vs.

Cleotis Garner,
Appellee.

On Appeal from the United States Court of Appeals
for the Sixth Circuit

SUPPLEMENTARY APPENDIX

The State of Tennessee, appellant herein, respectfully submits for the Court's consideration this Supplementary Appendix to the Jurisdictional Statement heretofore filed by the appellant in this case. This Supplementary Appendix consists of the opinion in this case of the United States District Court for the Western District of Tennessee, Western Division, the Honorable Harry W. Wellford, Judge, presiding.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. C-75-140

Cleamon Garner, etc.,
Plaintiff,
v.
Memphis Police Department, et al.,
Defendants.

ORDER

(Filed February 29, 1980)

Plaintiff brought this civil rights action in April of 1975 seeking damages for the shooting death of his son, who was killed by the police officer while attempting to flee from arrest. Named as defendants were the Memphis Police Department; the City of Memphis; Wyeth Chandler, Mayor of Memphis; and E. H. Hymon, the Memphis police officer who fired the shot that caused young Garner's death. The defendants other than Officer Hymon were sued on the grounds that they failed to exercise due care in the hiring, training, and supervision of officers and also on the grounds that their policies authorizing the use of deadly force against nonviolent felony suspects and the use of hollow point bullets were unconstitutional. In addition, plaintiff asserted that lethal force would not have been employed had his son been white.

Plaintiff's complaint purported to assert an action for damages under 42 USC §§ 1981, 1983, 1985, and 1988 to redress

alleged deprivations of rights secured by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

By Order of August 18, 1975, this Court ruled that plaintiff could not utilize 42 USC § 1983 and 28 USC § 1343 to assert claims against the City of Memphis or the Memphis Police Department since at that time, prior to the decision in *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), those entities were not "persons" within the meaning of § 1983. *See Monroe* v. *Pape*, 365 U.S. 165 (1961). The Court nevertheless invoked jurisdiction over both of these defendants under 28 USC § 1331, relying on *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971).

Following a bench trial, the Court held that the training programs and guidelines of the Police Department regarding the use of lethal force were adequate and that neither the City nor the Police Department could be found negligent on that basis. *See Memorandum Opinion*, November 29, 1976.[1] The Court further held that the use of hollow point bullets, based on the proof and evidence presented, was not implemented merely for the infliction of excessive punishment and did not violate standards of civilized conduct or "shock the conscience." *See Rochin* v. *California*, 343 U.S. 165 (1952).

Police Department officials testified that the department became concerned when the type of bullets previously used proved ineffective at stopping assailants and resulted in the death of a Memphis policeman. After conducting comparative tests, the

---

[1] It is noteworthy that although plaintiff in this case failed to establish negligence on the par. of defendants, even a showing of negligence may be insufficient to establish liability under § 1983. *See Gomez* v. *Toledo*, 602 F.2d 1018 (1st Cir. 1979). The decision in *Gomez* held that a § 1983 plaintiff must establish malice or recklessness. 602 F.2d at 1020.

department found the hollow point bullets more effective in this regard and also less likely to ricochet and injure innocent bystanders. There was also evidence that other police departments and the FBI used such ammunition. *See* Trial Transcript, Vol. III. Finally, the evidence showed that, under the circumstances of the wounding of Garner, death would have occurred regardless of the type bullet used, thus preventing any claim for compensatory damages under this particular theory of liability.

The Court additionally noted that the constitutionality of Tenn. Code Ann. § 40-808, permitting a city to authorize its officers to use deadly force against fleeing felons, had been upheld previously in *Cunningham* v. *Ellington*, 323 F.Supp. 1072 (W.D. Tenn. 1971) (three-judge court, Chief Judge Phillips participating).

Cunningham v. *Ellington*, *supra*, upheld the use of lethal force against fleeing felons, armed or otherwise, when no other effective alternatives were available to effect arrest and to prevent escape. Subsequent Sixth Circuit decisions have noted this holding with approval. For example, the Sixth Circuit panel in *Wiley* v. *Memphis Police Department*, 548 F.2d 1247, 1251, *cert. denied*, 434 U.S. 822 (1977), expressly stated that the decision in *Beech* v. *Melancon*, 465 F.2d 425 (6th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973), had held the Tennessee statute to be constitutional. Under these circumstances, this Court declined to reconsider further the constitutionality of the use of deadly force by the Memphis Police Department *per se*, rather considering the adequacy of its policies and regulations in safeguarding previously delineated constitutional rights.

Intervening decisions in this Circuit and elsewhere provide little justification for re-examining the facial validity of the Tennessee statute. The only decision noted which held the use of deadly force against fleeing felons to be unconstitutional was vacated by the Supreme Court. *See Mattis* v. *Schnarr*, 547 F.2d 1007 (8th Cir.), *vacated as advisory opinion sub nom.*, *Ashcroft* v. *Mattis*, 431 U.S. 171 (1977). This decision was strongly criticized by the Sixth Circuit in *Wiley* v. *Memphis Police Department*, 548 F.2d 1247, 1252-53 (1977), *cert. denied*, 434 U.S. 822 (1977).

In addition, the Second Circuit in *Jones* v. *Marshall*, 528 F.2d 132 (2d Cir. 1975), held constitutional a Connecticut law affording a privilege to police officers to use deadly force when they reasonably believe that a felony has been committed and that force is necessary to effect arrest, a law virtually identical to that in Tennessee. In *Marshall*, the fleeing felon was suspected of auto theft and there was no threat of deadly force by the suspect. The Second Circuit refused to impose a federal constitutional requirement that deadly force be employed by officers only when the crime suspected involves a threat to death or bodily injury, holding that the state must be given some leeway in legislating in this sensitive and contested area. *Id.* at 139-42.

Finally, it should be noted that although the evidence presented at trial in this case suggested that Garner appeared unarmed, the officers could not have known this with certainty, nor could they have known whether the crime he had apparently committed was against persons or against property only. This recurring dilemma exposes the difficulty with any statute that attempts to restrict the use of deadly force only to particular types of offenses or in which the fleeing felon is armed.

Finally, the Court found that in view of all surrounding circumstances, Officer Hymon had acted without malice and within his responsibilities as a police officer under the guidelines and policies of the Memphis Police Department.[1]

---

[1] The Court further noted that Hymon had a competent record as a police officer and that he was the type person who was a desirable police recruit because of his education, background, ability, and race.

On appeal, the Sixth Circuit upheld this Court's holding as to Officer Hymon, but remanded the case against the City for "reconsideration" in light of *Monell* v. *Department of Social Services*, *supra*, which as noted before, reversed *Monroe* v. *Pape*, *supra*, in holding that a city or municipal agency may be held liable as persons in damages under § 1983 for constitutional deprivations that result from a "policy or custom" followed by the City. 436 U.S. at 694, n. 66. The remand noted that a qualified immunity insulated the officers and officials in the case from personal liability, but asserted that the following questions remain open under *Monell*:

> "1. Does a municipality have a similar qualified immunity or privilege based on good faith under *Monell*?
>
> 2. If not, is a municipality's use of deadly force under Tennessee law to capture allegedly non-dangerous felons fleeing from nonviolent crimes constitutionally permissible under the fourth, sixth, eighth, and fourteenth amendments?
>
> 3. Is the municipality's use of hollow point bullets constitutionally permissible under these provisions of the Constitution?
>
> 4. If the municipal conduct in any of these respects violates the constitution, did the conduct flow from a 'policy or custom' for which the City is liable in damages under *Monell*?"

600 F.2d 52, 55 (6th Cir. 1979).

After carefully reviewing the earlier proceedings in this case as well as subsequent submissions by both parties, and after hearing further argument by their counsel, this Court has difficulty in determining how the decision in *Monell* has any effect on this Court's prior decision and it is concluded that further evidentiary proceedings are inappropriate under all of the circumstances.

I. SCOPE OF INITIAL TRIAL AND HOLDING

Plaintiff's broad complaint in this case alleged that the killing of his son violated the latter's constitutional right and was the direct and proximate result of the following alleged actions of the City and Police Department: 1) hiring an individual unqualified for the job, 2) allowing the use of deadly force against suspects without providing adequate training; 3) allowing the use of hollow point bullets; and 4) authorizing the use of deadly force against "nonviolent" felony suspects. Plaintiff further asserted that his son would not have been shot had he been white.

Although rejecting plaintiff's pre-*Monell* attempt to invoke the Court's jurisdiction under 42 USC § 1983 and 28 USC § 1343(3) with respect to the City and Police Department, the Court held that jurisdiction over both these defendants was properly invoked under the Fourteenth Amendment and the general federal question statute, 28 USC § 1331. *See Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971) ("federal courts do have the power to award damages for violation of 'constitutionally protected interest' "); *see also Beauty* v. *City of Euclid*, 496 F.2d 193 (6th Cir. 1974).

Thus, as a result of the Court's exercise of jurisdiction under § 1331, the City of Memphis was potentially liable in damages for each and all the constitutional violations asserted by plaintiffs under 42 USC § 1983, who had full opportunity to develop proof and evidence on each of the issues raised.[1]

At trial, which lasted several days, plaintiff submitted substantial evidence concerning the policies, practices, and training programs of the City and Police Department with respect to the use of lethal force, including testimony regarding

---

[1] Plaintiff's very competent counsel is now a high ranking member of the United States Department of Justice.

the use of such force against suspects who, upon investigation, were, in fact, unarmed. In addition, considerable evidence was introduced concerning the utilization of hollow point ammunition.*

Following presentation of proof, counsel for defendant noted that plaintiff had presented no evidence to substantiate the assertion that his son had been denied equal protection on the basis of race. After counsel for plaintiff expressed no desire to pursue this facet of the case further, the Court disposed of the issue summarily.*

As noted above, the Court considered all claims against all defendants (except for the dismissed equal protection claim) and the evidence presented on each claim in its Opinion of November 29, 1976. Finding that plaintiff had failed to establish any constitutional violations, the Court ordered judgment in favor of all defendants.

---

* The Court has reviewed the full record carefully in light of the remand in this respect, as well as others considered.

* This Court did have occasion to consider an equal protection challenge in an earlier, somewhat similar case, *Wiley v. Memphis Police Department*, No. C-73-8 (W.D. Tenn. June 30, 1975), *aff'd.*, 548 F.2d 1247 (6th Cir.), *cert. denied*, 434 U.S. 822 (1977). This Court found that plaintiff in *Wiley* failed to establish discriminatory intent on the part of defendant was affirmed on appeal. The reference by the circuit panel in this case to statistics introduced in *Wiley* leaves this Court somewhat puzzled as to their relevance here. In any event, plaintiff in the present action offered no evidence whatsoever to support his claim of racial discrimination; in *Wiley*, as the Court recalls it, there were assertions that the white police officers involved would not have fired at the fleeing suspect had he been white instead of black. There were distinct racial overtones in that case not pursued by white counsel here despite the opportunity to do so.

II. EFFECT OF MONELL V. DEPARTMENT OF SOCIAL SERVICES

To discern the effect of *Monell* on the instant case, 42 USC § 1983 creates no *independent* rights or protections, but merely provides a federal cause of action for violations of rights conferred by the Constitution and perhaps by other federal statutes. As the Supreme Court recently stated: "'one cannot go into court and claim a "violation of § 1983"—for § 1983 by itself does not protect anyone against anything.'" *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 617 (1979).

The decision in *Monell* therefore simply makes municipalities liable under § 1983 *if* and when they violate rights conferred by the Constitution, provided the deprivation results from municipal policy or custom. In the earlier proceeding in this case, as a result of the Court's recognition of a direct action under the Fourteenth Amendment and jurisdiction premised on 28 USC § 1331, the City was potentially liable for all the constitutional violations then and now alleged by plaintiff.* This potential liability would have been no greater, no different, had the Court exercised jurisdiction under § 1983 and 28 USC § 1343.* Since plaintiff's constitutional claims received full and careful consideration under § 1331, reconsideration under *Monell* with additional evidentiary hearings would be inap-

---

* Although some of the constitutional provisions relied upon by plaintiff are of questionable application to this case, pertinent state actions as to these claims are incorporated through Fourteenth Amendment application. *See Silver v. New York*, 392 U.S. 40 (1968); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Robinson v. California*, 370 U.S. 660 (1962).

* Potential municipal liability could conceivably be less extensive under § 1983 because of the necessity of "policy or custom" prescribed in *Monell*. *Compare Lane v. City of Providence*, 463 F.Supp. 381 (D.R.I. 1978) (since Congress in fact provided an adequate remedy under § 1983, no reason exists to imply a cause of action under § 1331).

propriate. Plaintiff has no new "cause of action" as a result of the decision in *Monell* and is bound by the previous judgment which we reiterate holding that the City and Police Department did not violate the Constitution.* The present effort by plaintiff to reopen the case and introduce additional evidence on issues already decided is barred by established principles of *res judicata*.

There is pending before the Supreme Court at present one case which dealt with similar issues in an action involving 42 USC § 1983 charges against a municipality, in which *Bivens v. Six Unknown Named Agents*, *supra*, rationale had been applied prior to *Monell*. In that case, *Owen v. City of Independence*, *supra*, the Supreme Court remanded to the Court of Appeals "for further consideration in light of *Monell*," *supra*, a decision rendered in 560 F.2d 925 (8th Cir. 1977). That Court held, as did this Judge, that 28 USC § 1331 authorized an action for damages for alleged constitutional violations against a city whether or not it was a "person" subject to suit under 42 USC § 1983. On remand, interpreting *Monell*, 436 U.S. at 695, 701, 707-08, 712-13, the Court of Appeals stated:

> . . . We imply from the Court's discussion of immunity that local governing bodies may assert a limited immunity defense to actions brought against them under section 1983.

* Since defendants were found not to have violated the Constitution in any respect and since the Court deemed the facial validity of the Tennessee law to have been previously decided, the availability of a qualified immunity for municipalities need not now be considered. In the absence of any actions that may result in a finding of liability, the question of immunity is immaterial.

Nevertheless, the absence of any evidence of bad faith in this case would probably immunize defendants from liability under the qualified municipal immunity in § 1983 actions recognized by an increasing number of courts. *See Soto v. County of Suffolk*, 604 F.2d 207 (2d Cir. 1979); *Owen v. City of Independence*, 589 F.2d 335 (8th Cir. 1978) (Supreme Court Appeal Pending); *Morgan v. Sharon, Pa. Board of Education*, 472 F.Supp. 1157 (W.D. Pa. 1979).

Owens, *supra*, 589 F.2d 337.

That Court expressly recognized prior to 1978, a good faith defense available to the municipality to a claim for damages for an alleged constitutional violation. Applying *Monell*, it held that "a limited immunity will apply to claims for equitable relief against municipalities." 589 F.2d 338.

Applying the *Owen* rationale, under the evidence presented to this Court, the City of Memphis has established a good faith defense. The City of Memphis also was entitled to claim a limited immunity in light of the evidence presented on plaintiff's constitutional allegations against it and other defendants in the trial of this cause. The very allegations made by plaintiff in this case against the City, and as to which he was afforded an opportunity to present evidence, related to policies and procedures allegedly established or utilized by the City and the Memphis Police Department, including its hiring and training practices.

In summation, then, the Court believes that each of the specific questions posed on remand have previously been addressed and answered in the Court's prior Memorandum Opinion, but this Judge has carefully re-examined the record, its notes, and the circumstances of the prior trial in light of the remand and *Monell*, *supra*.

The answer to question No. 1 is "yes" based upon *Owen*, *supra*, and cases cited. Whether or not the City has such immunity, however, plaintiff has failed to make out a prima facie case of any claimed constitutional violation.

The answer to question No. 2 would also seem clearly to be "yes" in light of prior authorities cited, particularly *Cunningham v. Ellington*, *supra*, which held squarely on similar facts that Tenn. Code Annot. 40-808 met federal constitutional standards on its face and that it was "not unconstitutional" in the face of similar attacks made by the same counsel involved in this case. 323 F.Supp.1076. (Two of the present Judges of the Sixth

Circuit Court of Appeals participated in that decision as well as the present Chief Judge of this Court.)

The answer to question No. 3 was answered "yes" in light of the evidence presented and the opportunity to present any pertinent proof relating to a constitutional challenge to this policy and practice. Absent further persuasive proof and evidence in another factual context, this Court would still answer "yes" to this inquiry.

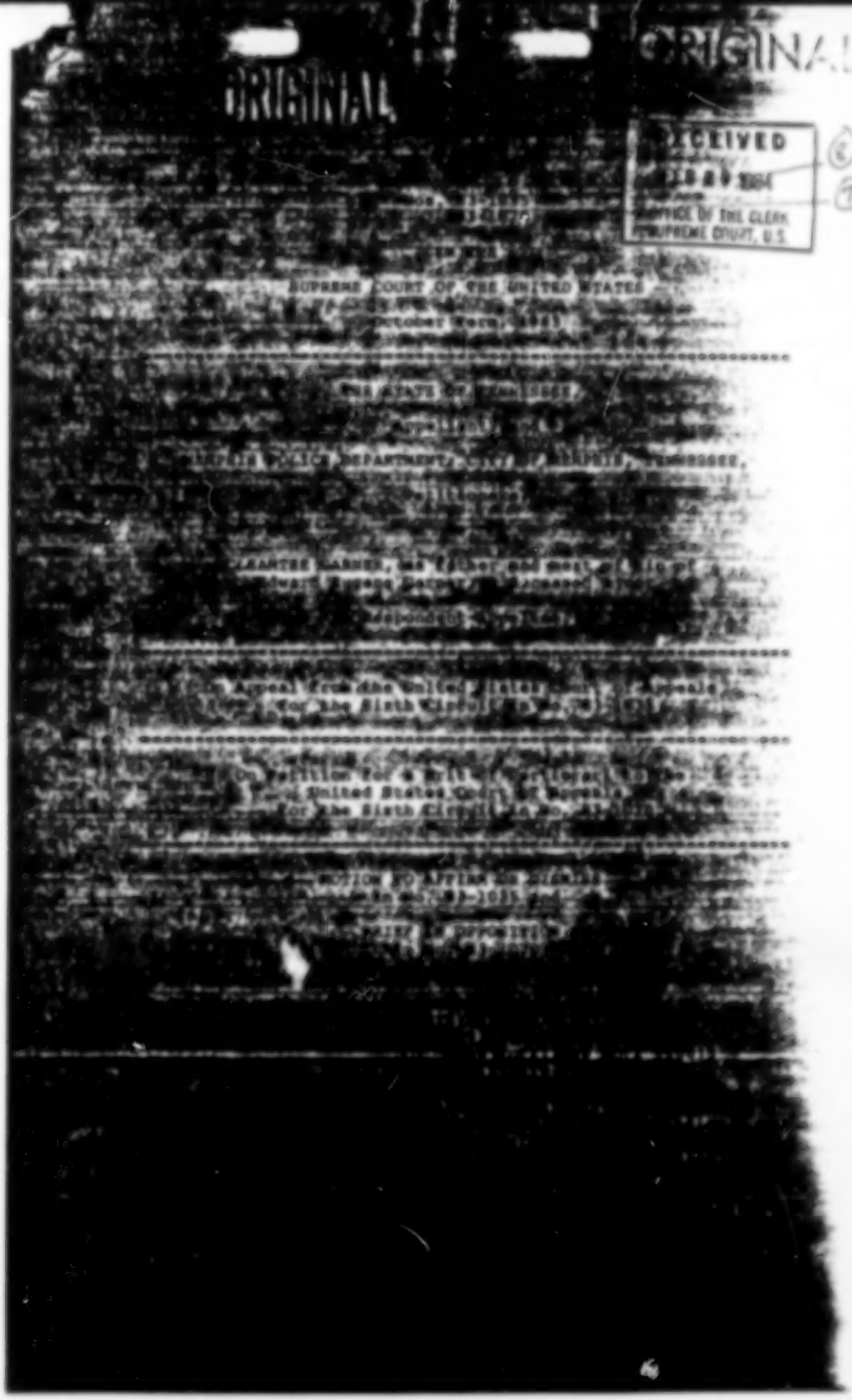
As to question No. 4, any answer would be purely speculative and conditional since municipal conduct referred to in prior questions was not determined in these respects to violate the Constitution.

The Court concludes therefore that judgment should issue for defendants, including the City of Memphis and the Memphis Police Department in light of *Monell* v. *Department of Social Services*, *supra*.

It is so ORDERED this 29th day of February, 1980.

/s/ Harry W. Wellford
Harry W. Wellford, Judge
United States District Court

MOTION



BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Does a State statute that confers unlimited discretion on police officers to shoot nondangerous, fleeing felony suspects whom they reasonably assume to be unarmed violate the fourth, sixth, eighth and fourteenth amendments?

2. Does a municipal policy and custom of liberal use of deadly force that results in the excessive and unnecessary use of such force to stop nondangerous, fleeing felony suspects violate the fourth, sixth, eighth and fourteenth amendments?

3. Is the Memphis policy authorizing the discretionary shooting of nondangerous, fleeing property crime suspects racially discriminatory?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iii
Opinions Below	1
Statement of the Case	2
Statement of Facts	3
Reasons for Denying Review	6
I. The Court of Appeals Correctly Held that a State Statute that Confers Unlimited Discretion on Police Officers to Shoot Nondangerous, Fleeing Felony Suspects Whom They Reasonably Assume to be Unarmed Violates Established Constitutional Principles	6
II. The Standard Adopted by the Court of Appeals is Workable and, as a Practical Matter, Will Not Interfere With Law Enforcement	15
III. The Judgment Below Should be Affirmed Because the Memphis Policy and Custom is One of Liberal Use of Deadly Force that Results in the Excessive and Unnecessary Use of Such Force to Stop Nondangerous, Fleeing Felony Suspects	21
IV. Memphis's Policy Authorizing the Discretionary Shooting of Nondangerous, Fleeing Property Crime Suspects Violates the Equal Protection Clause Because it is Racially Discriminatory	25
Conclusion	27

TABLE OF AUTHORITIES

Cases:	Page
Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977)	30
Avery v. State of Georgia, 345 U.S. 559 (1953)	31
Beech v. Melancon, 465 F.2d 425 (6th Cir. 1972)	22
Bell v. Wolfish, 441 U.S. 520 (1979)	12
Bivens v. Six Unknown Agents, 403 U.S. 388 (1971)	7
Byrd v. Brishke, 466 F.2d 6 (7th Cir. 1972)	12
Camara v. Municipal Court, 387 U.S. 523 (1967)	10
Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971), rev'd on other grounds, 409 U.S. 418 (1973)	12
Castaneda v. Partida, 430 U.S. 482 (1977)	31
Clark v. Diedonia, 368 F. Supp. 344 (E.D. Wisc. 1973), aff'd on other grounds, 513 F.2d 79 (7th Cir. 1975)	16
Cunningham v. Ellington, 323 F. Supp. 1072 (W.D. Tenn. 1971)	22
Cupp v. Murphy, 412 U.S. 291 (1973)	9
Dalia v. United States, 411 U.S. 238 (1979)	9
Davis v. Mississippi, 394 U.S. 721 (1969)	9, 11
Delaware v. New York, 442 U.S. 200 (1979)	9
Desmond v. Florida, ____ U.S. ____, 73 L.Ed.2d 1140 (1982)	14-15
Florida v. Royer, 460 U.S. ____, 75 L.Ed.2d 229 (1983)	11
Furman v. Georgia, 408 U.S. 238 (1972)	28
Garner v. Memphis Police Dept., 710 F.2d 240 (6th Cir. 1983)	passim
Garner v. Memphis Police Dept., 600 F.2d 52 (6th Cir. 1979)	2, 3, 14, 26
Giant Foods, Inc. v. Seberry, 51 Md. App. 586, 544 A.2d 683 (1982)	16, 17, 18
Gregg v. Georgia, 428 U.S. 153 (1976)	28

Cases:	Page
Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974)	12
Hayes v. Memphis Police Dept., 571 F.2d 357 (6th Cir. 1978)	22
Herrera v. Valentine, 653 F.2d 1220 (8th Cir. 1981)	12
Howell v. Cataldi, 464 F.2d 272 (3rd Cir. 1972)	12
Ingraham v. Wright, 430 U.S. 651 (1977)	12
Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970)	8, 11
Johnson v. Glick, 481 F.2d 1027 (2d Cir.), cert. denied, 414 U.S. 1033 (1973)	12, 13
Johnson v. Zerbst, 304 U.S. 458 (1938)	7
Jones v. Marshall, 528 F.2d 132 (2d Cir. 1975)	8, 13
Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)	12-13
Ker v. California, 374 U.S. 23 (1963)	9
Kortum v. Alkire, 69 C.A.3d 325, 138 Cal. Rptr. 26 (1977)	16, 17, 18
Krause v. Rhodes, 570 F.2d 563 (6th Cir. 1977)	12
Landrigan v. City of Warwick, 628 F.2d 736 (1st Cir. 1980)	12
Leite v. City of Providence, 463 F. Supp. 585 (D. R.I. 1978)	26
McKenna v. City of Memphis, 544 F. Supp. 415 (W.D. Tenn. 1982)	22, 25
Melorun v. State, 23 Wyom. 12, 146 P.596 (1915)	16
Monell v. Department of Social Services, 436 U.S. 658 (1978)	2, 3, 13, 26
Morgan v. Labiak, 368 F.2d 338 (10th Cir. 1966)	12
Qualls v. Pariah, 534 F.2d 690 (6th Cir. 1976)	22
Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972)	31
Schmerber v. California, 384 U.S. 757 (1966)	9, 11

Cases: Page

Schumann v. City of St. Paul, 268 N.W.2d 903 (Minn. 1978) 16

Screws v. United States, 325 U.S. 91 (1945) 12

State ex rel. Baumgarner v. Sims, 139 W.Va. 92, 79 S.E.2d 277 (1963) 16

State v. Sundberg, 611 P.2d 44 (Alas. 1980) 16

Teftt v. Seward, 689 F.2d 637 (6th Cir. 1982) 12

Terry v. Ohio, 392 U.S. 1 (1968) 8, 9, 10, 11

Trop v. Dulles, 356 U.S. 86 (1958) 7

United States v. Calandra, 414 U.S. 338 (1974) 9

United States v. City of Memphis, Civ. Action C-74-286 (W.D. Tenn. 1974) 31

United States v. Clark, 31 Fed. 710 (C.C.E.D.Mich 1887) 13

United States v. Place, ___ U.S. ___, 77 L.Ed.2d 110 (1983) 9, 10

United States v. Stokes, 506 F.2d 771 (5th Cir. 1975) 12

United States v. Villarin Gerena, 553 F.2d 723 (1st Cir. 1977) 12

Ureneck v. Lima, 359 Mass. 749, 269 N.E.2d 670 (1971) 16

Washington v. Davis, 426 U.S. 224 (1976) 31

Werner v. Hartfelder, 113 Mich. App. 747, 318 N.W.2d 825 (1982) 17

Wiley v. Memphis Police Dept., 548 F.2d 1247 (6th Cir. 1977), aff'g, Civ. Action No. C-73-8 (W.D. Tenn. June 30, 1975) 13, 22, 24, 27

Williams v. Kelly, 624 F.2d 695 (5th Cir. 1980) 7

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 7, 26

Constitutional and Statutory Authorities: Page

U.S. Constitution amend. IV 9

U.S. Constitution amend. XIV, § 1 7

42 U.S.C. § 1981 2

42 U.S.C. § 1983 2

Alaska Stat. § 11.81.370 16

Cal. Penal Code § 196 (West 1970) 17

Hawaii Rev. Stat. Title 37, § 703-307(3) (1976) 18

Iowa Code § 804.8 16

Minn. Stat. Ann. § 609.7 16

Tenn. Code Ann. § 40-808 (1975) 3, 8, 14

Tex. Penal Code, Art. 2, § 9.51(c) (1974) 18

Other Authorities:

W.A. Geller & H.J. Karales, Split Second Decisions: Shootings of and by Chicago Police (Chicago Law Enforcement Study Group 1981) 19

4 W. Blackstone, Commentaries (Garland ed. 1978) 13

M. Blumberg, The Use of Deadly Firearms by Police Officers: The Impact of Individuals, Communities, and Race (Ph.D. Dissertation, S.U.N.Y., Albany, Sch. of Crim. Justice Dec. 14, 1982) 19

Bonlen & Schulman, Arrest With and Without a Warrant, 75 U. Pa. L. Rev. 485 (1927) 13

Fyfe, Observations on Deadly Force, 27 Crime & Delinquency 376 (1981) 20

Matulia, A Balance of Forces: A Report of the International Association of Chiefs of Police (National Institute of Justice 1982) 16, 17, 18, 21

Myer, Police Shootings at Minorities: The Case of Los Angeles, 52 Annals of Amer. Acad. & Soc. Sci. 98 (1980) 19

R. Perkins, Criminal Law (2d ed. 1969) 13

	Page
Ringel, Searches and Seizures, Arrests and Cofessions, §23.7 (2d ed. 1982)	16
Sherman, Execution Without Trial: Police Homicide and the Constitution, 33 Vand. L. Rev. 71 (1980)	12-13
T. Taylor, Two Studies in Constituional Interpretation (1966)	13
Commission on Accreditation For Law Enforcement Agencies, Standard for Law Enforcement Agencies (August 1983)	21
Community Relations Service, United States Department of Justice, Memphis Police and Minority Community: A Critique (May 1984) .	31
Comment, Deadly Force to Arrest: Triggering Constitutional Review, 11 Harv. Civ. Rights-Civ. Lib.L. Rev. 360 (976)	13, 16-17
Note, Legalized Murder of a Fleeing Felon, 15 Va. L. Rev. 582 (1929)	13
Note, The Use of Deadly Force in Arizona by Police Officers, 1972 L.& Soc. Order 481	13
Staff Report to the Michigan Civil Rights Commission, (May 18, 1981)	17

Nos. 83-1035
83-1070

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

THE STATE OF TENNESSEE,

Appellant, and

MEMPHIS POLICE DEPARTMENT; CITY OF MEMPHIS, TENNESSEE,

Petitioners,

v.

CLEAMTEE GARNER, as father and next of kin of Edward Eugene Garner, a deceased minor,

Respondent-Appellee.

On Appeal from the United States Court of Appeals for the Sixth Circuit in No. 83-1035

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit in No. 83-1070

MOTION TO AFFIRM OR DISMISS
in No. 83-1035 and

BRIEF IN OPPOSITION
in No. 83-1070

Respondent-appellee, CLEAMTEE GARNER, respectfully submits that his motion to affirm the judgment below or dismiss the appeal in No. 83-1035 should be granted and that the petition for a writ of certiorari in No. 83-1070 should be denied.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit, rendered on June 16, 1983, is reported as Garner v. Memphis Police Dept., 710 F.2d 240 (6th Cir. 1983). Rehearing was denied on September 26, 1983; this order is

notes at 710 F.2d at 240. The Sixth Circuit's prior opinion is reported at 600 F.2d 52 (6th Cir. 1979).*/

STATEMENT OF THE CASE

Fifteen-year-old Edward Eugene Garner was shot and killed by a Memphis police officer on the night of October 3, 1974. On April 8, 1975, Cleamtee Garner filed "an action for damages brought pursuant to 42 U.S.C. §§ 1981, 1983, 1985, 1986 and 1988 to redress the deprivations of the rights, privileges and immunities of Plaintiff's deceased son, Edward Eugene Garner, secured by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution." Complaint ¶ 2; App. 6.1/ On August 18, 1975, the district court entered an order dismissing the City of Memphis and the Memphis Police Department as defendants under 42 U.S.C. § 1983. Trial was held on August 2 through 4, 1976. On September 29, 1976, the district court entered a memorandum opinion rendering judgment for the defendants.

Plaintiff appealed. The court of appeals, Chief Judge Edwards and Judges Merritt and Lively, reversed and remanded the case for reconsideration in light of Monell v. Department of Social Services, 436 U.S. 658 (1978). One of the questions that it listed for consideration on remand was whether "a municipality's use of deadly force under Tennessee law to capture allegedly nondangerous felons fleeing from

---

*/ Citations to the opinions below are to the appendix to the petition for a writ of certiorari in No. 83-1070 and are designated as A. ____. Citations to the record below are to the Joint Appendix in the Sixth Circuit and are designated as App. ____.

1/ The suggestion by the state, appellant in No. 83-1035, that the fourth amendment had not been raised, see Jurisdictional Statement at 5, is incorrect. Indeed, the district court noted in its initial opinion that: "Plaintiff cited specifically in this regard the Fourth Amendment right to be free of unreasonable seizure of the body ... incorporated into the due process clause of the Fourteenth Amendment and made applicable to the States." A. 2. See also Complaint ¶ 19, App. 11-12; Memorandum Opinion of Feb. 29, 1980, A. 21.

nonviolent crimes [is] constitutionally permissible under the fourth, sixth, eighth and fourteenth amendments?" Garner v. Memphis Police Dept., 600 F.2d 52, 55 (6th Cir. 1979); A. 18. It also remanded for consideration of the question of Memphis's "policy or custom" for purposes of liability under Monell. Id., 600 F.2d at 55; A. 19.

On remand, the district court denied plaintiff the opportunity to introduce additional evidence on the question of the Memphis "policy or custom," to submit an offer of proof, or to submit a brief on the merits; it entered judgment for the defendants. A. 20. After consideration of plaintiff's motion to reconsider, the court allowed the submission of a brief and offer of proof and then again entered judgment for the defendants. A. 31. The court of appeals, Chief Judge Edwards and Judges Merritt and Keith, reversed. It held that the Tennessee statute, Tenn. Code Ann. § 40-808 (1975), violated the fourth amendment and the due process clause of the fourteenth amendment "because it authorizes the unnecessarily severe and excessive, and therefore unreasonable," use of deadly force to effect the "arrest" of unarmed, nonviolent, fleeing felony suspects such as plaintiff's son. 710 F.2d at 241; A. 40-41. Rehearing and rehearing en banc were denied on September 26, 1983. 710 F.2d at 246; A. 50.

STATEMENT OF FACTS

At the time of his death, Edward Eugene Garner was fifteen-years-old. He was an obvious juvenile; slender of build, he weighed between 85 and 100 pounds and stood only five feet and four inches high. App. 78 and 290-91. He

had a minor juvenile record. At the age of 12, he and two other boys illegally entered the house in whose yard they were playing. App. 686 and 689. In July of 1974, his family called the police when they discovered that he had taken a jar of pennies from a neighbor's house.[2/] He was placed on probation for one year. App. 88-89 and 689. There was also a prior arrest for a curfew violation, but that was resolved when it was explained that young Garner was working at a local store and under supervision at the time. App. 64 and 693-94.

On the night of October 3, 1974, Officers Hymon and Wright responded to a burglary in progress call at 737 Vollentine in Memphis. When they arrived at that address, a woman was standing in the door pointing at the house next door. Upon inquiry by Officer Hymon, she said that "she had heard some glass breaking or something, and she knew that somebody was breaking in." App. 207.[3/] Hymon went around the near side of the house, his revolver drawn, while Wright went around the far side. Hymon reached the backyard first, where he heard a door slam and saw someone run from the back of the house. He located young Garner with his flashlight:

2/ The neighbor declined to call the police about this minor incident. It was the family that insisted that the police be called. App. 88-89.

3/ Hymon testified that: "Roughly I recall her saying, 'They are breaking inside....'" App. 207. He qualified that testimony when he was asked: "Did you understand her to be saying that there were several people inside the house?" He responded: "I don't really think she knew. I think that she -- I think that she might have mentioned that she had heard some glass breaking or something, and she knew that somebody was breaking in. I don't think that the plural form had any indication of her knowing." Id.

This version was corroborated by his partner, Officer Wright. He testified that: "I was leaning over in the street like this to hear what she was saying through the open door. She said, 'Somebody is breaking in there right now.'" App. 707.

Garner was crouched next to a six foot cyclone fence at the back of the yard about 30 to 40 feet away from Hymon. Hymon was able to see one or both of Garner's hands; he concluded that Garner was not armed. App. 239, 246-47, 650, and 677.[4/]

While young Garner crouched in Hymon's flashlight beam, Hymon identified himself and ordered Garner to halt. Garner paused a few moments during which Hymon made no attempt to advance,[5/] but continues to aim his revolver at Garner. Garner bolted, attempting to jump the fence. Hymon fired, striking young Garner in the head. Garner fell, draped over the fence. He did not die immediately; when the paramedics arrived on the scene "he was holding his head and just thrashing about on the ground," App. 141, "hollering, you know, from the pain." App. 137. Edward Eugene Garner died on the operating table. App. 153.

4/ At his deposition, introduced into evidence, Hymon testified that: "I am reasonably sure that the individual was not armed...." App. 246. On direct examination by the city at trial, Hymon was asked: "Did you know positively whether or not he was armed?" He replied: "I assumed he wasn't...." App. 650.

Hymon also testified that Garner did not act as an armed suspect would, neither firing a weapon nor throwing it down. App. 246. He testified that: "I figured, well, if he is armed I'm standing out in the light and all of the light is on me the[n] I assume he would have made some kind of attempt to defend himself...." App. 650. That officer Hymon operated on the assumption that young Garner was unarmed is further corroborated by his testimony that he "definitely" would have warned his partner if he had had any question whether Garner was armed, App. 246-47, and that: "I would have taken more cover than what I had." Id.

5/ Hymon testified that he did no more than take "a couple of steps," App. 651, "which wasn't, you know, far enough to make a difference." App. 256. Officer Wright testified that when he rounded the corner of the house after the shot, Hymon "was standing still...." App. 720. According to Wright, it took only "three or four seconds" for Hymon to reach Garner after the shot. Id.

There was no one home when the house was broken into. After the shooting, the police found that young Garner had ten dollars and a coin purse taken from the house. App. 737. The owner of the house testified that the only items missing were a coin purse containing ten dollars and a ring belonging to his wife, but that the ring was never found. The ten dollars were returned. App. 169.[6/]

Plaintiff called two expert witnesses -- Chief Detective Dan Jones of the Shelby County Sheriff's Department and Inspector Eugene Barksdale, former commander of the personal crimes bureau of the Memphis Police Department -- to testify about the reasonableness of Hymon's use of deadly force under the circumstances. As the district court found: "The substance of such testimony was to the effect that Hymon should first have exhausted reasonable alternatives such as giving chase and determining whether he had a reasonable opportunity to apprehend him in some other fashion before firing his weapon." A. 8. Both Jones and Barksdale testified that Hymon "should have tried to apprehend him." App. 378 and 379; Barksdale added that "in all probability he could have apprehended the subject without having to shoot him...." App. 373.

REASONS FOR DENYING REVIEW

I. THE COURT OF APPEALS CORRECTLY HELD THAT A STATE STATUTE THAT CONFERS UNLIMITED DISCRETION ON POLICE OFFICERS TO SHOOT NON-DANGEROUS, FLEEING FELONY SUSPECTS WHOM THEY REASONABLY ASSUME TO BE UNARMED VIOLATES ESTABLISHED CONSTITUTIONAL PRINCIPLES

The court of appeals applied established constitutional principles to review a state statute that authorizes

---

6/ The owner also testified that: "The first -- I had some old coins in there and when they did let me in, I went to them. They were still there." Id.

police officers to use deadly force against nondangerous, fleeing felony suspects. It held that the fourth amendment applies and that it requires reasonable methods of capturing suspects. 710 F.2d at 243; A. 44. As at common law -- when all felonies were capital offenses, the fleeing felon doctrine authorized the use of deadly force to prevent the felon's escape -- the court of appeals held that the fourth amendment allows only the reasonable, proportioned use of deadly force in the arrest context: i.e., "the police response must relate to the gravity and need...." Bivens v. Six Unknown Agents, 403 U.S. 388, 419 (1971) (Burger, C.J., dissenting). Since the use of deadly force against unarmed, nonviolent felony suspects is excessive, it violates the fourth amendment. 710 F.2d at 246; A. 51.

The court of appeals also held that the use of deadly force against unarmed, nonviolent felony suspects violates due process. The due process clause explicitly protects the right to life, U.S. Const. amend. XIV, § 1; Williams v. Kelly, 624 F.2d 695, 697 (5th Cir. 1980), a right so axiomatic that it is an understatement to characterize it as "fundamental." Compare Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) ("the fundamental rights to life, liberty and the pursuit of happiness"), and Johnson v. Zerbst, 304 U.S. 458, 462 (1938) ("fundamental human rights of life and liberty"), with Trop v. Dulles, 356 U.S. 86, 102 (1958) ("the right to have rights"). The Tennessee statute falls under the due process clause because the state interests cannot support the taking of life in the context of a nonviolent, nondangerous felony. 710 F.2d at 246-47; A. 52-53.

The state and the city argue that the court of appeals erred because the fourth amendment does no more than set the minimum standard -- i.e., probable cause -- for initiating an arrest, but that it does not govern the manner of police action in effectuating that arrest. Jurisdictional Statement at 6-9; Cert. Petition at 10-11. They argue that the reliance placed by the court of appeals on the Fourth Circuit's ruling in Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970), is misplaced because in Jenkins the officer had no probable cause to arrest and, thus, was not authorized to use any force. Jurisdictional Statement at 8; Cert. Petition at 11. Finally, they argue that the Court should grant review because the decision in this case conflicts with that of the Second Circuit in Jones v. Marshall, 528 F.2d 132 (2d Cir. 1975). Jurisdictional Statement at 10; Cert. Petition at 10.

The state and the city are wrong on each of these points, and the court of appeals is correct. As we show below, the fourth amendment plainly applies under the principles consistently enunciated by this Court and affirmed again only last Term. Moreover, the ruling below is entirely consistent with the decision in Jenkins and the parallel authority in every circuit, including the Second Circuit.

The Tennessee statute at issue, Tenn. Code Ann. § 40-809, provides that:

> If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest.

Id. It is an arrest statute; there can be no suggestion that "such police conduct is outside the purview of the Fourth Amendment." Terry v. Ohio, 392 U.S. 1, 16 (1968). The fourth amendment speaks directly to: "The right of the people

to be secure in their persons ... against unreasonable ... seizures...." U.S. Const. amend. IV; Terry, 392 U.S. at 16 ("It is quite plain that the Fourth Amendment governs 'seizures' of the person...."); accord United States v. Place, ___ U.S. ___, 77 L.Ed.2d 110, 121-22 (1983); Dunaway v. New York, 442 U.S. 200, 207 (1979); Cupp v. Murphy, 412 U.S. 291, 294 (1973); Davis v. Mississippi, 394 U.S. 721, 726-27 (1969).

Moreover, the Court has long repudiated the contention that the fourth amendment governs only the "when" of police action and not the "how." Only last Term, the Court reaffirmed what it "observed in Terry, '[t]he manner in which the seizure ...[was] conducted is, of course, as vital a part of the inquiry as whether [it was] warranted at all.'" United States v. Place, 77 L.Ed.2d at 121 (quoting Terry, 392 U.S. at 28).[1] In Place, the Court went on to "examine the agents' conduct...." id., and found it "sufficient to render the seizure unreasonable." Id. at 122. See Schmerber v. California, 384 U.S. 757, 768 (1966) ("whether the means and procedures employed ... respected relevant Fourth Amendment standards of reasonableness"); Ker v. California, 374 U.S. 23, 38 (1963) (whether "the method of entering the home may offend federal constitutional standards of reasonableness"); United States v. Calandra, 414 U.S. 338, 346 (1974) (subpoena "far too sweeping in its terms to be regarded as reasonable' under the Fourth Amendment") (dicta); Dalia v. United States, 441 U.S. 238, 258 (1979)("the manner in which a warrant is

---

1/ In Terry, the Court added that: "The Fourth Amendment proceeds as much by limitations upon the scope of governmental action as by imposing preconditions upon its initiation." 392 U.S. at 28-29.

executed is subject to later judicial review as to its reasonableness").

In determining the reasonableness of the use of deadly force under the fourth amendment, the court of appeals followed exactly the mode of analysis applied by this Court in considering other forms of police action.

> Terry and its progeny rests on a balancing of the competing interests to determine the reasonableness of the type of seizure involved within the meaning of "the Fourth Amendment's general prescription against unreasonable searches and seizures." 392 U.S. at 20. We must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.

United States v. Place, 77 L.Ed.2d at 118.[8/] The court of appeals looked at the "nature and quality of the intrusion:" As an intrusion by police, the use of deadly force is "a seizure 'unique in its severity and irrevocability.'" Garner, 710 F.2d at 240; A. 84 (quoting Gregg v. Georgia, 428 U.S. 153, 187 (1976)). It balanced this against the state's interests and concluded that, as was true at common law, the state interests are proportionate only when the underlying felony is a violent one or the fleeing suspect will endanger the physical safety of others.[9/] The court of appeals thus properly applied settled fourth amendment principles and correctly arrived at the decision below.

Jenkins v. Averett, on which the court of appeals relied, is consistent with this reasoning. Nowhere in Jenkins did the Fourth Circuit engage in the reasoning suggested by the state and the city: that the shooting violates the fourth amendment because there was no probable cause to arrest. To the contrary, the Fourth Circuit never discussed whether the police were authorized to stop Jenkins. Rather, the vice it found was that "our plaintiff was subjected to the reckless use of excessive force." 424 F.2d at 1232 (emphasis added).

Jenkins was premised on the principle that the fourth amendment protects the "inestimable right of personal security." Id., 424 F.2d at 1232 (quoting Terry v. Ohio, 392 U.S. at 8-9). Accord Florida v. Royer, 460 U.S. ____, 75 L.Ed.2d 229, 238 (1983); Davis v. Mississippi, 394 U.S. at 726-27 ("Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry...."). As such, the fourth amendment "shield covers the individual's physical integrity." Jenkins, 424 F.2d at 232. See Schmerber v. California, 384 U.S. at 767 ("we are dealing with intrusions into the human body"). Every circuit has concurred in this conclusion, although most now follow the

---

8/ In fact, this mode of analysis did not originate in Terry; the Terry Court derived it from the decision in Camara v. Municipal Court, 387 U.S. 523 (1967):

> In order to assess the reasonableness of the police conduct as a general proposition, it is necessary "first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen," for there is "no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails."

Terry, 392 U.S. at 20-21 (quoting Camara, 387 U.S. at 534-35, 536-37).

9/ The city argues that the court of appeals "fail[ed] to recognize the valid state interests encompassed by the statute...." Cert. Petition at 11. This is false. The scope of the state interests in the use of deadly force were fully briefed in the court below. Brief for Appellees at 18; Brief for Appellant at 21-26, 33-35. They will not be recapitulated here because of the necessary length of such a discussion. Suffice it to note that the question was fully considered by the court below; it simply decided the issue adverse to the city.

Second Circuit's lead as articulated by Judge Friendly in Johnson v. Glick, 481 F.2d 1028 (2d Cir.), cert. denied, 414 U.S. 1033 (1973), that "quite apart from any 'specific' of the Bill of Rights, application of undue force by law enforcement officers deprives a suspect of liberty without due process of law." Id. at 1032; accord Landrigan v. City of Warwick, 628 F.2d 736, 741-42 (1st Cir. 1980) (citing United States v. Villarin Cerena, 553 F.2d 723, 728 (1st Cir. 1977) (fourth and fifth amendments)); Howell v. Cataldi, 464 F.2d 272 (3rd Cir. 1972); United States v. Stokes, 506 F.2d 771, 775-76 (5th Cir. 1975); Tefft v. Seward 689 F.2d 637, 639 n. 1 (6th Cir. 1982); Byrd v. Brishke, 466 F.2d 6 (7th Cir. 1972); Herrera v. Valentine, 653 F.2d 1220, 1229 (8th Cir. 1981); Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974); Morgan v. Labiak, 369 F.2d 338 (10th Cir. 1966); Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971), rev'd on other grounds, 409 U.S. 418 (1973). The court of appeals simply applied the well established principle that excessive force by law enforcement personnel violates the fourth amendment and the due process clause to the facts of this case.[10/]

10/ In the courts below, respondent-appellee advanced another, established, due process principle that supports the judgment. The due process clause provides "protection against punishment without due process of law...." Bell v. Wolfish, 441 U.S. 520, 535 (1979); accord Ingraham v. Wright, 430 U.S. 651, 671-72 n. 40 (1977); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 165-67 (1963); Screws v. United States, 325 U.S. 91, 106 (1945); Krause v. Rhodes, 570 F.2d 563, 572 (6th Cir. 1977). Application of the seven Mendoza-Martinez criteria, cited in Wolfish as "useful guideposts," 441 U.S. at 538, establishes that the shooting of nondangerous, fleeing felony suspects "amounts to punishment," id. at 535, in violation of the due process clause. Sherman, Execution Without Trial: Police Homicide and the Constitution, 33 Vand. L. Rev. 71 (1980). This conclusion is particularly supported by the history of the common law fleeing felon doctrine, which was a direct outgrowth of the application of capital punishment and, in its earliest incarnations, summary punishment for

The state and city's argument that the decision below is in conflict with the Second Circuit opinion in Jones v. Marshall is simply wrong. Jones was decided before Monell. Jones decided only the question of the privilege the police officer could invoke under § 1983, not the substantive constitutional question under the fourteenth amendment. Id., 528 F.2d at 137, 138, 140, 142. Indeed, it expressly rejected the view of the defendant in that case that the Connecticut statute was constitutional and that no further analysis was necessary. Id. at 137. Rather, it noted that Johnson v. Glick provides the controlling constitutional principle, id. at 139, declined to assess the balance of the competing interests, id. at 142, and instead incorporated the Connecticut rule of the officer's privilege as a defense to the § 1983 action. Id. at 138, 142. Thus, the opinion in Jones is in striking conformity with the rulings of the court of appeals in this case. On the first appeal, the Sixth Circuit held that the officer was entitled to invoke the qualified privilege of good faith reliance on state law.

10/ continued

all felonies. Sherman, supra, at 81; see also 4 W. Blackstone, Commentaries 90 (Garland ed. 1978); United States v. Clark, 31 Fed. 710, 713 (C.C.E.D.Mich. 1887); Mahlen & Schulman, Arrest With and Without a Warrant, 75 U. Pa. L. Rev. 485, 495 (1927); Note, Legalized Murder of a Fleeing Felon, 15 Va. L. Rev. 582, 583 (1929); T. Taylor, Two Studies in Constitutional Interpretation 28 (1968); R. Perkins, Criminal Law 10 (2d ed. 1969); Note, The Use of Deadly Force in Arizona by Police Officers, 1972 L. & Soc. Order 481, 482; Comment, Deadly Force to Arrest: Triggering Constitutional Review, 11 Harv. Civ. Rights & Civ. Lib. L. Rev. 361, 365 (1976). In addition, the Memphis policy promotes one of "the traditional aims of punishment." Mendoza-Martinez, 372 U.S. at 168-69. The record establishes "that one of the principal purposes of Memphis's policy ... is to deter criminal conduct." Wiley, v. Memphis Police Dept., Civ. Action No. C-73-8, Slip op. at 13 (W.D. Tenn. June 30, 1975); see App. 962, 1032-33 and 1048-50. Neither of the courts below, however, addressed this aspect of the due process issue.

Garner, 600 F.2d at 54; A. 16-A. 17. On the second appeal, it reached the constitutional question not decided in Jones and held the state statute unconstitutional. 710 F.2d at 246-47; A. 51-A. 53.

The city makes one last argument against the balance of competing interests struck by the court of appeals. Without any supporting authority, it asserts that "the nighttime breaking and entering a dwelling is a crime so frequently associated with the commission of violence...." Cert. Petition at 13. But there is no evidence in the record to support this bald assertion.[11/] Nor has the Tennessee legislature ever made such a factual determination. The statute at issue in this case was passed in 1858 and merely codified the then existing common law, Tenn. Code Ann. § 40-808; the Tennessee legislature has never held hearings on this question.

The available evidence is to the contrary. As the Court has observed,

> competent observers have concluded that there is no basis in experience for the notion that death so frequently occurs in the course of a felony for which killing is not an essential ingredient.... This conclusion was based on three comparisons of robbery statistics, each of which showed that only about one-half of one percent of robberies resulted in homicide. The most recent national crime statistics strongly support this conclusion.

11/ This argument is, in fact, inconsistent with the city's position in the prior cases and that expressed in the record in this case. The mayor of Memphis has on several occasions testified under oath regarding the reasons for the Memphis policy allowing the officer discretion to shoot unarmed burlgary suspects. On those occasions, he has testified that the policy is justified not because burglars commit violence in connections with that crime, but because they graduate to commit subsequent crimes of violence. App. 961; App. 1032-34.

Knowns v. Florida, ___ U.S. ___, 73 L.Ed.2d 1140, 1151 (1982) (citations and footnotes omitted). In light of the fact that this is so for robbery, a crime that by definition involves the use of force or the threatened use of force, the city's assertion with regard to burglary is highly questionable.

In sum, the court of appeals applied well established fourth amendment principles as enunciated by this Court. It applied principles under the fourth amendment and the due process clause that are consistent with the holdings of every circuit in the country. The decision below is correct, and review by this Court is unnecessary.

II. THE STANDARD ADOPTED BY THE COURT OF APPEALS IS WORKABLE AND, AS A PRACTICAL MATTER, WILL NOT INTERFERE WITH LAW ENFORCEMENT

The state and the city argue that the rule adopted by the court of appeals "places burdensome and impractical constraints on effective law enforcement," Jurisdictional Statement at 7, and that it "will create much confusion among law enforcement officers...." Cert. Petition at 11. That is simply not so. The court of appeals has adopted a standard that is clear, workable, and not unduly restrictive of law enforcement. Before an officer uses deadly force to stop a fleeing felony suspect, he or she must have "an objective, reasonable basis in fact to believe that the felon is dangerous or has committed a violent crime." 710 F.2d at 246; A. 52.

In fact, the actual practices of most law enforcement agencies demonstrate the practicability of the standard adopted by the court of appeals. Most jurisdictions already restrain the use of deadly force by police officers in a manner that is as restrictive or more restrictive than that adopted by the

court below. The common sense of law enforcement professionals across the nation is that these restrictive standards are workable and do not hamper effective law enforcement.

While some number of states still retain the common law rule, [12] comparatively few police departments actually operate under that standard. Several states that ostensibly follow the common law rule have modified it by judicial interpretation. For example, California is normally listed as one of those states that has codified the common law rule by statute. See e.g., Matulia, A Balance of Forces: A Report of the International Association of Chiefs of Police 17 (National Institute of Justice 1982); Comment, Deadly Force to Arrest: Triggering

---

12/ The state cites Ringel, Searches and Seizures, Arrests and Confessions, § 23.7 at 23-29 (2d ed. 1982), for the proposition that there are 24 states with statutes adopting the common law rule. Ringel, however, provides neither a listing of states nor authorities. An earlier article lists 24 states with statutes that codify the common law, Comment, Deadly Force to Arrest: Triggering Constitutional Review, 11 Harv. Civ. Rights - Civ. Lib. L. Rev. 364, 368 n.20 (1976), but that listing is now incorrect. At least three of those states have amended their statutes. See Alaska Stat. § 11.81.370; Iowa Code § 804.8; Minn. Stat. Ann. § 609.7; see Schoepke v. City of St. Paul, 264 N.W.2d 403 (Minn. 1978). Also, as indicated in the text, infra, some of those states have read their statutes more narrowly, confining the use of deadly force to those fleeing violent felonies. See Kortum v. Alkire, 69 C.A.3d 325, 138 Cal.Rptr. 26 (1977); State v. Sundberg, 611 P.2d 44 (Alas. 1980) (reading prior Alaska statute consistently with new statute and limiting it to dangerous felonies); see also Clark v. Simonis, 366 F. Supp. 544, 546 (E.D.Wisc. 1973), aff'd on other grounds, 513 F.2d 79 (7th Cir. 1975) (reading Wisconsin statute as limited to violent felony situations).

Several states have no statute. In these jurisdictions, it is sometimes difficult to ascertain what rule is applied since the case law is frequently of substantial vintage. See, e.g., State ex rel. Baumgarner v. Sims, 139 W.Va. 92, 79 S.E.2d 277 (1953); Baldrum v. State, 23 Wyom. 12, 146 P. 596 (1915). As discussed infra, this may reflect the fact that few jurisdictions actually employ deadly force to stop nondangerous fleeing felony suspects. Of the prior common law jurisdictions, some have reaffirmed the rule in recent years, Granack v. Sims, 359 Mass. 749, 269 N.E.2d 670 (1971), while others have modified it. Giant Foods, Inc. v. Scherry, 51 Md.App. 586, 444 A.2d 483 (1982).

Constitutional Review, 11 Harv. Civ. Rights-Civ. Lib. L. Rev. 360, 368 n.20 (1976); Cal. Penal Code § 196 (West 1970). Its courts, however, have interpreted that statute to allow the use of deadly force against only those fleeing violent felonies. Kortum v. Alkire, 69 C.A.3d 325, 138 Cal. Rptr. 26 (1977). Similarly, Maryland was a common law jurisdiction, but its courts have limited the privilege to use deadly force to those situations involving an immediate threat of harm. Giant Foods, Inc. v. Scherry, 51 Md. App. 586, 444 A.2d 483 (1982) (robber fleeing without threat of violence).

More importantly, the actual practices of most police departments are governed not by state law but by more restrictive municipal or departmental policies. See Matulia, supra, at 153-64. For example, Michigan is a common law jurisdiction. See Denver v. Hartfelder, 113 Mich. App. 747, 318 N.W.2d 825 (1982). But more than half of the local law enforcement agencies have deadly force policies that are more restrictive than the common law and about 75% of those are consonant with the standard adopted by the court of appeals in this case. Staff Report to the Michigan Civil Rights Commission at 54 et seq. (May 10, 1981). This trend is particularly true of major metropolitan areas. Although Arizona, Connecticut, Massachusetts, New Mexico, and Ohio are common law states, Phoenix, New Haven, Boston, Albuquerque, Santa Fe, Cincinnati, and Dayton all have deadly force policies that would bar the shooting in this case. App. 1319, 1291 1131, 1116, 1330, 1299, & 1218. [13]

13/ The same is true for the Memphis Police Department, whose written policy is stricter than state law in that it prohibits the use of deadly force against those fleeing arrest from certain property crimes such as embezzlement. App. 1276. Although Memphis's written policy does authorize the shooting of fleeing burglars, it would prohibit the shooting that occurred in this case because it applies a defense of life standard when the fleeing suspect is a juvenile. Id.

The most recent survey of municipal deadly force policies confirms this trend. The International Association of Chiefs of Police ("IACP") solicited the deadly force policies of all cities over 250,000. All but three responded. Matulia, supra, at 153. Only four, or 7.5%, follow the common law rule. More than half limit the use of deadly force in a manner that is consonant with or stricter than the standard adopted by the court of appeals. About 40% limit the use of deadly force to those fleeing from "atrocious" felonies; the IACP report does not distinguish between those policies that exclude burglary from that category and those that include it. Id. at 141.[14/] The survey of municipal deadly force policies contained in the offer of proof, although somewhat dated, is to the same effect. The offer of proof contains the deadly force policies of 42 cities, including 30 of the 44 largest cities in this country.[15/] Over 70% of these policies would bar the shooting in this case; almost two thirds apply standards consonant with the decision below. The record information indicates that, for the 44 largest cities, these figures are 84% and 77%, respectively.[16/]

14/ The information available to respondent-appellee, including the municipal policies contained in the offer of proof, indicate that no more than half of these policies include burglary as an "atrocious" felony. Thus, only about one quarter of the municipal policies considered by the IACP would allow the shooting in this case.

15/ Of the fourteen cities from this category that are not represented in the offer of proof, information is available on seven. Six of these cities -- Houston, El Paso, Forth Worth, Austin, San Antonio, and Honolulu -- are in states with deadly force statutes modeled on the Model Penal Code. Tex. Penal Code, Art. 2, §9.51(c) (1974); Hawaii Rev. Stat. Title 37, § 703-307(3)(1974). Two others -- Baltimore, Maryland, and Long Beach, California -- are in states whose courts have restricted the use of deadly force. Giant Foods, supra; Scruggs v. Kibiro, supra.

16/ These figures include the seven cites discussed in n.15, supra.

Permissive state laws and municipal policies notwithstanding, very few police departments actually use deadly force to stop fleeing suspects. Only a small minority of police firearm discharges nationwide are for the purpose of stopping nondangerous fleeing felony suspects.[17/] In large part, this reflects the fact that handguns are an unreliable means of effecting an arrest. For example, the record information on the use of deadly force to stop fleeing property crime suspects in Memphis shows that between 1969 and 1974, Memphis police used their revolvers to attempt to stop fleeing suspects on 114 occasions, resulting in only 16 woundings and 17 deaths. App. 1460-69.[18/] Although the data is incomplete, it appears that a large percentage of the suspects fired upon eluded capture. Id.; App. 957. In the words of the Memphis police director: "The chances are ... under the circumstances where deadly force is used..., he [the police officer] will not hit [the suspect]." App. 950. He testified that part of the reason for banning warning shots was the fact that it had the opposite of the desired effect; it tended to spur the fleeing suspect. He concludes that shots that miss probably have the same effect. App. 963-64.

17/ The figures vary, of course, from city to city depending on that city's policy. See App. 791 (11.3% in New York between 1971-1975); W.A. Geller & K.J. Karales, Split Second Decisions: Shootings of and by Chicago Police 6 (Chicago Law Enforcement Study Group 1981) (17% between 1974-1978); M. Myer, Police Shootings at Minorities: The Case of Los Angeles, 52 Annals of Amer. Acad. of Pol. & Soc. Sci. 98, 104 (1980) (between 1974-1978, 15% of all shootings at blacks, 9% of all shootings at Hispanics, and 9% of all shootings at whites); M. Blumberg, The Use of Deadly Firearms by Police Officers: The Impact of Individuals, Communities, and Race 201 (Ph.D. Dissertation, S.U.N.Y., Albany, Sch. of Crim. Justice Dec. 14, 1982) (7.6% in Atlanta between 1975-1978; between 1973-1974, 4.6% in the District of Columbia, 2.6% in Portland, Ore., but 50.1% in Indianapolis).

18/ This represents only about half of all firearm discharges by Memphis police during this period. App. 1469.

Similarly, the use of deadly force in this context is insignificant to the ability of the police to make felony arrests. This is true in Memphis as elsewhere. Between 1969 and 1974, Memphis police attempted to make property crime arrests with their firearms on 114 occasions, many of which were not successful. But during this period they made more than twenty-six thousand arrests for property crimes. App. 1767. As the Memphis police director observed: "of all arrests how many involve the use of deadly force, I would say it would be less than one percent, probably less than a half percent.... [I]f you want to even boil it down to arrests of felons I think you'd still find it less than -- well, let's say you'd find it a minute percentage point." App. 957-58. Dr. Fyfe has observed: "[I]n order for the police to have cleared even one percent [more] of the nonviolent felonies [burglary, larceny, and auto larceny] reported in 1978 through 'apprehensions effected by shooting,' they would have had to increase the rate at which they shot people during that year by at least fifty-fold. Doing so would have resulted in approximately 35,000 fatalities and 70,000 woundings." Fyfe, Observations on Deadly Force, 27 Crime & Delinquency 376, 381 (1981).

Thus, it is not surprising that, as noted above, the majority of modern police departments no longer authorize the use of deadly force in this context. Many, including the FBI, App. 1469, apply a strict defense of life policy. Also telling is the position of professional police organizations.[19/] The

---

19/ Respondent-appellee recognizes that such standards "do not establish the constitutional minima ...." Bell v. Wolfish, 441 U.S. at 543 n.27, and does not offer them as such. Indeed, these standards are more restrictive than that adopted by the court of appeals under the fourth amendment. But these standards are surely "instructive," Wolfish, supra, of the degree to which experienced police professionals have concluded that the authority to shoot nondangerous fleeing suspects is not necessary to effective law enforcement.

standard recommended by the IACP report is that: "An officer may use deadly force to effect the capture or prevent the escape of a suspect whose freedom is reasonably believed to represent an imminent threat of grave bodily harm or death to the officer or other person(s)." Matulia, supra, at 144 (emphasis in original). Similarly, the Standards for Law Enforcement Agencies (August 1983) of the Commission on Accreditation for Law Enforcement Agencies[20/] provides "that an officer may use deadly force only when the officer reasonably believes that the action is in defense of human life, including the officer's own life, or in defense of any person in immediate danger of serious physical injury." Standard 1.3.3.

In sum, the clear position of the organized, professional police community -- as reflected by its standards, written policies, and practices -- refutes the state's argument that effective law enforcement will be hampered without the authority to shoot nondangerous fleeing felony suspects.

III. THE JUDGMENT BELOW SHOULD BE AFFIRMED BECAUSE THE MEMPHIS POLICY AND CUSTOM IS ONE OF LIBERAL USE OF DEADLY FORCE THAT RESULTS IN THE EXCESSIVE AND UNNECESSARY USE OF SUCH FORCE TO STOP NONDANGEROUS, FLEEING FELONY SUSPECTS

Although the court of appeals did not reach the question of the constitutionality of Memphis's policy and customs regarding the use of deadly force, it was familiar with the exceptional record of Memphis police with regard to the shooting of fleeing

---

20/ These standards were "prepared by the four major law enforcement executive membership associations, the ... IACP, National Organization of Black Law Enforcement Executives (NOBLE); National Sheriffs' Association (NSA); and the Police Executive Branch Forum (PEBF)." Id. at iii.

suspects, particularly blacks. See Sapp v. Memphis Police Dept., 591 F.2d 357 (6th Cir. 1978); Wiley v. Memphis Police Dept., 548 F.2d 1247 (6th Cir. 1977); Qualls v. Parish, 534 F.2d 684 (6th Cir. 1976); Beech v. Melancon, 465 F.2d 425 (6th Cir. 1972); see also Cunningham v. Ellington, 323 F. Supp. 1072 (W.D. Tenn. 1971) (three judge court); McKenna v. City of Memphis, 344 F. Supp. 415 (W.D. Tenn. 1982) (shooting of brother officer in attempt to stop fleeing misdemeanant).[21/] The excessiveness of the Memphis policies and customs in violation of the fourth amendment and the due process clause is an alternative ground for affirming the judgment below. Rule 20.5, Rules of the Supreme Court of the United States.

Even assuming the appropriateness of using one's revolver to arrest a suspect, Memphis's policies, practices, and customs go beyond what is necessary. Because of the district court's decision not to allow further hearings on remand, the record on the question of the Memphis policy or custom is a hybrid. It consists of the evidence adduced at the original trial and the offer of proof tendered on remand.[22/] But despite the nature of the record and the lack of findings below, it is clear that Memphis's use of deadly force to stop nondangerous suspects is uniquely excessive in its execution.

21/ As indicated above, supra n.17 and text accompanying nn.17-18, the percentage of firearm discharges against non-dangerous, fleeing suspects as compared to all firearm discharges by Memphis police is amongst the highest in the nation. It is also noteworthy that Memphis accounts for about 30% of all the reported federal cases on this issue in the last 20 years.

22/ Organized in fifteen parts, the offer of proof includes affidavits of expert witnesses who would have been called to testify, App. 765-97; excerpts from prior federal cases against the Memphis Police Department that illuminate Memphis's actual policies and customs regarding the use of deadly force, App. 798-1019, 1409-57, 1460-69, 1477-1601, and 1610-1691; excerpts from the report of the Tennessee Advisory Committee to the

At trial, plaintiff called Captain Colette, who was responsible for recruit training and the ammunition policies of the Memphis Police Department. He testified that the Memphis police have always used a .38 caliber Smith and Wesson. In the years immediately preceding the Garner shooting, Memphis twice upgraded its ammunition to bullets with greater velocity, accuracy, and predicted wounding power. App. 413-16, 435-37, and 447. The bullet that was finally selected was the 158 grain, semi-jacketed, hollow-point Remington. Both Colette and the Shelby County medical examiner testified that this bullet is a "dum-dum" bullet banned in international use by the Hague Convention of 1899 because it is designed to produce more grievous wounds. App. 457-58 and 572. This is the bullet that killed young Garner.

Colette also testified that Memphis recruits are taught to aim at the torso, or "center mass," where vital organs are more likely to be hit. App. 351-54. See also App. 1397 and 1607-08.[23/] Together with the use of "dum-dum" bullets, this creates a far greater risk that the resulting wound will be fatal. Moreover, the interplay of these two

---

22/ continued

U.S. Commission on Civil Rights, which was based on hearings on civil rights abuses by the Memphis Police Department, App. 1050-58; the deadly force policies of 44 major municipalities, App. 1158-1369; the training materials for the New York Police Department, App. 1369-1408; and an excerpt from an LEAA publication on deadly force that details police training procedures used in other cities but not in Memphis. App. 1662-13.

23/ Captain Colette testified that the reason for teaching recruits to aim for the torso was not related to police safety; it did not create a better chance of neutralizing a dangerous suspect. App. 353-57. Rather, it is taught solely because the torso presents a greater target and thus reduces the chances of missing. App. 357-58.

factors creates an indelible impression upon the Memphis police officer that the policy of the department is one encouraging use of one's revolver.[24/] Indeed, in a prior case, the district court found that Memphis police officers "were trained whenever they use their firearms to 'shoot to kill.'" Wiley v. Memphis Police Dept., 548 F.2d at 1256.

Other policies, practices, and customs of the Memphis Police Department also encourage the quick resort to the use of deadly force without a proper effort to exhaust other alternatives. Captain Coletta testified that the department used the file "Shoot - Don't Shoot," which presents only armed fleeing felons in its situational illustrations of the fleeing felon rule, App. 529-32;[25/] that there was no training in alternatives that should be exhausted before resorting to deadly force to stop unarmed fleeing felony suspects, App. 342; that the department's

---

24/ Chief William B. Bracey would have testified that "a definite message was transmitted when [Memphis] reiterated its policy of shooting 'to stop' and at the same time introduced the use of dum-dum bullets. The message transmitted to line officers would seem to support the department's support of firearm use." App. 771.

At the time of his affidavit, William B. Bracey was Chief of Patrol of the New York Police Department with supervisory authority over all 17,500 uniformed personnel of the New York Police Department. He would also have testified that guidelines and committed enforcement of those guidelines by the police hierarchy will lead to reductions in the use of unnecessary deadly force; that New York has reduced firearms discharges by 50% by these means; that the result of this reduction has been the increased safety of New York Police Department officers with fewer assaults on officers and fewer deaths; that law enforcement has been unhampered; that training, including training in alternatives to minimize the need for use of deadly force, and discipline are the keys to reducing unnecessary deadly force; that shooting unarmed fleeing felons is related to the officer's subjective estimate of punishment; and that the Memphis policies of shooting fleeing property crime suspects, use of "dum-dum" bullets, and training and discipline were all deficient. App. 769-70.

25/ The heavy reliance on the "Shoot/Don't Shoot" film encourages the use firearms because, as respondent-appellee's expert Chief Bracey would have testified, it has a negative effect on an inexperienced recruit, making him jumpy and more likely to employ deadly force. App. 770.

firearms manual details firearms techniques, but not techniques to avoid the need for the use of weapons, App. 344-45; and that the use of deadly force to stop fleeing felony suspects is left to the individual officer's discretion: recruits are simply told that they must live with themselves if they kill a person. App. 326 and 345. Accord App. 195-96, 901, 956, and 1796.

It is particularly significant that there is no training on when to use deadly force. This lack of guidance operates in tandem with a policy -- evidenced by pronouncements of the mayor, App. 1632 and 1825-28, and the miserable failure of the Memphis Police Department disciplinary procedures, App. 547 and 1858,[26/] -- not to review and control firearm discharges. As a result, Memphis officers get the clear message that they can deadly force without guidelines and with impunity. The proximate result is the excessive use of deadly force in situations when it is not necessary in order to apprehend the subject.

This case provides an adequate illustration: The police experts testified that Hymon should have attempted to apprehend young Garner, who was only 30 to 40 feet away, rather than relying solely on his gun. A. 8.[27/] Other illustrations abound. In McKenna, the officer who hit his fellow officer was shooting at a fleeing misdemeanant; he was a known shooter but had never been disciplined or retrained. 544 F. Supp. at 417.

26/ No Memphis police officer had ever been disciplined for the use of his gun. App. 547 and 1858. The civilian complaint procedures are designed to deter complaints. App. 1050-58. First, there is a rule that all complainants must take a polygraph while no officer is ever required to. Second, the procedures require that the officer against whom a charge is made must immediately be notified of the complainant's name and address. App. 1050-58.

27/ The only witness to testify that the officer was justified in using his gun was Captain Coletta, who had both trained Hymon and sat on the review board that condoned the shooting. App. 506 & 507-09. Even so, his opinion was based on an assumption not supported by the facts: that Hymon was "physically barred from the area by a fence." App. 532.

In another instance, Memphis officers shot and killed a fleeing black teenager who had committed car theft, even though his accomplice was already in custody and could have provided identification. The officer who shot never considered any alternatives, not even giving chase. App. 844-45.

There can be little doubt that myriad Memphis policies and customs are implicated as the cause of the shooting death of respondent-appellee's son. "In this case, City officials did set the policies involved ... training and supervising the police force...," Leite v. City of Providence, 463 F. Supp. 585, 589 (D. R.I. 1978), exposing the city to liability under Monell. Young Garner was shot pursuant to that liberal use of deadly force policy and custom "which allows an officer to kill a fleeing felon rather than run the risk of allowing him to escape apprehension." Garner, 600 F. 2d at 54; A. 16. Here, the officer did no more than follow that policy, as he "was taught." Id. at 53; A. 16. The judgment below should be affirmed on this basis alone.

IV. MEMPHIS'S POLICY AUTHORIZING THE DISCRETIONARY SHOOTING OF NONDANGEROUS, FLEEING PROPERTY CRIME SUSPECTS VIOLATES THE EQUAL PROTECTION CLAUSE BECAUSE IT IS RACIALLY DISCRIMINATORY

The Memphis policy runs afoul of the Constitution in another fundamental way not discussed by the court of appeals: It is a policy that discriminates on the basis of race. The materials contained in the offer of proof betray a policy "in actual operation, and the facts shown establish an administration ... with an evil eye and an unequal hand" in violation of the fourteenth amendment Yick Wo v. Hopkins, 118 U.S. at 373-74; see also Furman v. Georgia, 408 U.S. 238, 389 n.12 (1972) (Burger, C. J., dissenting).

The offer of proof contains the raw data concerning all arrests in Memphis between 1963 and 1974, App. 1409-57 and

1767-68; data on all shootings of fleeing property crime suspects between 1969 and 1974, App. 1460-69; data on all those killed by Memphis police officers between 1969 and 1976, App. 1764-67 and 1071;[28/] prior analysis of this data by a statistician, App. 1769-77, and his testimony at an earlier trial regarding this analysis, App. 1559-62 and 1589-92; historical data regarding race discrimination by the Memphis Police Department from 1874 through the mid-seventies, including the deposition testimony of the mayor and police director supporting this conclusion, App. 908-910, 928-32, 972-74, 1539-40, 1571-75, 1646-56, 1677-78, 1690, and 1828-29; and the affidavit of plaintiff's expert, Dr. James J. Fyfe,[29/] which analyzed in detail the arrest and shooting data contained in the offer of proof. App. 787-97.

On the use of deadly force, the data reveal that there are significant disparities based on the race of the shooting victim/suspect and that virtually all of this disparity occurs as the result of the Memphis policy that allows officers to exercise their discretion to shoot fleeing property crime suspects. Between 1969 and 1976, blacks constituted 70.6% of those arrested for property crimes in Memphis but 88.4% of the property crime suspects shot at by the Memphis police. In contrast, the percentage of black violent crime suspects shot at by Memphis police was closely proportionate to their percentage in the violent crime arrest population: 65.4% and 63.1%, respectively. App. 1771.

28/ All of the foregoing data was collected and provided by the Memphis Police Department as defendant in Wiley v. Memphis Police Dept., Civ. Action No. C-73-6 (W.D. Tenn. June 30, 1975), aff'd, 548 F.2d 1247 (6th Cir. 1977).

29/ Dr. Fyfe is a former New York Police Department lieutenant and training officer. He designed a firearms trainings program for the New York Police Department in which over 20,000 officers have participated. His doctoral thesis concerned the use of deadly force by New York Police Department officers. He is an associate professor at The American University in Washington, D.C., and has served as a consultant on the deadly force issue for the United States Department of Justice and the Civil Rights Commission. App. 788-89. He also teaches courses at the F.B.I. National Academy at Quantico, Va.

Dr. Fyfe reviewed this data and concluded that controlling for differential racial representation in the arrest population, black property crime suspects were more than twice as likely to be shot at than whites (4.33 per 1000 black property crime arrests; 1.61 per 1000 property crime arrests), four times more likely to be wounded (.586 per 1000 blacks; .1113 per 1000 whites), and 40% more likely to be killed (.63 per 1000 blacks; .45 per 1000 whites). App. 792.

Comparison of shootings by Memphis Police officers while controlling for race of the shooting victim and the nature of the incident provided similarly striking data. Dr. Fyfe's analysis of the shooting incidents between 1969 and 1976 described by the Memphis Police Department to the Civil Rights Commission showed a dramatic disparity between the situations in which whites were killed and those in which blacks were killed. Of the blacks shot, 50% were unarmed and nonassaultive, 23.1% assaultive but not armed with a gun, 26.9% assaultive and armed with a gun. Of the whites shot, only one was non-assaultive (12.5%), five (62.5%) were armed with a gun, and the remaining two (25%) were assaultive but not armed with a gun.[30/]

Based on this data, Dr. Fyfe concluded that, during the period in question, Memphis police were far more likely to shoot blacks than whites in non-threatening circumstances and that the great disparity in blacks shot by Memphis police officers is largely accounted for by the policy allowing the discretionary shooting of non-dangerous fleeing felony suspects. Between 1969 and 1976, Memphis police killed 2.6 unarmed, non-assaultive blacks for each armed, assaultive white. App. 793-94.

30/ Dr. Fyfe noted that: "These are certainly dramatic differences, but no measure of their significance is possible ... because the only statistically significant category of whites killed is those armed with guns." App. 794.

Plaintiff proffered this evidence having previously requested both additional discovery and a hearing on these factual questions. The district court, in its post-reconsideration order, A. 31, rejected Dr. Fyfe's conclusions on the basis of several unsupportable considerations. It noted Dr. Fyfe's "bias," A. 34, without ever having seen him testify.[31/] It attacked Dr. Fyfe's conclusions because, it claimed, he failed to "specify the actual number of blacks arrested and/or convicted for alleged 'property crimes' as compared to whites during this perion." A. 32. But, as discussed above, Dr. Fyfe's analysis specifically "controls for differential involvement among the races in property crime...." App. 792; indeed, the data on which Dr. Fyfe relied was included in the offer of proof and provided the actual number of both white and black property crime arrests together with the raw data of all arrests. App. 1409-57 and 1767-88. The district court questioned the delineation of "'property crime' in the Fyfe definition." A. 32. But the delineation between property crimes and violent crimes that Dr. Fyfe employed was that made by the Memphis Police Department and included with the arrest statistics. App. 1559 and 1767-68. In numerous similar ways, the district court misapprehended[32/]

31/ The district court's "bias" finding was based on Dr. Fyfe's disagreement with the Memphis policy allowing the use of deadly force against nondangerous suspects. This "bias," however, is the official policy of the F.B.I. and numerous metropolitan police departments as disparate as New York, Atlanta, and Charlotte, North Carolina. See App. 1113, 1200, 1293, and 1669.

32/ For example, in questioning Dr. Fyfe's observation that the incidence of use of deadly force in property crime arrests in Memphis far exceeded that in New York, the district court noted that: "Professor Fyfe admitted his comparison was not 'precise' in respect to 'property crimes' comparison." A. 32 n. 1. But Dr. Fyfe accounted for this imprecision in a way that favored Memphis. His "admission" was that:

Moreover, the district court failed to consider that the historical background of the Memphis Police Department corroborates the inference of discrimination that arises from the statistics. Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 265-67 (1977). The department's history is one of entrenched racism in employment, promotion, and law enforcement.[33/] The department was repeatedly the agent of enforcement of the segregation laws in the 60's, App. 1539-40, engaging in racial abuse and brutality during the sanitation strike in 1968. App. 1571-75. A 1970 NAACP Ad Hoc Committee Report concluded that: "the most common form of address by a Memphis policeman to a black person appears to be 'nigger.'" App. 1671. And, it was acknowledged by Mayor Chandler that, as late as 1972:

> The black community, speaking generally and in a broad sense, perceives the police department as having consistently brutalized them, almost their enemy instead of their friend.... [T]alking about in 1972, what you say is absolutely true and I would say almost across the board.

33/ continued

> More than half (50.7 percent) of the police shootings in Memphis during 1969-1974 involved shooting at property crime suspects. The comparable percentage in 1971-1976 in New York was no more than 11.8 percent. This comparison is not precise because the New York City figure includes all shootings to "prevent or terminate crimes." Thus, it includes shootings precipitated by both property crimes and crimes of violence. My estimate of the percentage of New York City police shootings which involved property crime suspects only is four percent.

App. 791.

Similarly, in arguing that Dr. Fyfe failed to control for disparate racial involvement in the underlying felonies, the district court alleged that Dr. Fyfe "concedes elsewhere that there is also 'differential racial involvement in police shootings.'" A. 32. What Dr. Fyfe said, however, is that: "In New York City, differential racial involvement in police shootings also exists, but [unlike Memphis] it is almost totally accounted for by differential racial involvement in the types of activities likely to precipitate shootings." App. 792.

33/ As long ago as 1874, a "Resolution asking Police Board to put 20 colored men on force, lost by vote 76-3" before the City Council. App. 1646.

App. 1828-29; accord App. 931-32 (police director testified that: "There is a basis in fact for the distrust of the black community .... Q. And 1974? A. Absolutely.").

In 1974, when young Garner was shot, blacks made up only 10% of the force and only 3.7% of the officers over lieutenant (there were no blacks higher than captain) in a city that was almost 40% black.[34/] This inevitably led to a situation where even the black officers, such as Hymon, were disposed to follow the ethos of the department. See Castaneda v. Partida, 430 U.S. 482, 499 (1977). The Memphis police director testified in 1979 that he "had equal problems with the black officers in terms of the black officers trying to out red-neck the white officers.... I mean that's literally [sic] what we had." App. 975.

The discretionary nature of the authority to shoot allowed Memphis police is another factor that confirms the racially discriminatory nature of the disparate impact of the Memphis policy regarding use of deadly force against nondangerous fleeing property crime suspects. The consignment to the officer's discretion is "a ready mechanism for discrimination." Brown v. General Motors Corp., 457 F. 2d 348, 359 (5th Cir. 1972) (Title VII). Cf. Avery v. State of Georgia, 345 U.S. 559, 562 (1953) (discrimination in jury selection). "[A] selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing." Castaneda v. Partida, 430 U.S. at 494 (citing Washington v. Davis, 426 U.S. 224, 241 (1976)).

In conclusion, Memphis's policy allowing the shooting of non-

---

34/ Community Relations Service, United States Department of Justice, Memphis Police and Minority Complaints: A Critique at 7 (May 1974), App. 1650. See also App. 976 & 974. That same year, an employment discrimination lawsuit brought by the Department of Justice was settled. The consent decree was designed to increase the hiring and promotion of black officers. United States v. City of Memphis, Civ. Action. C-74-284 (W.D. Tenn. 1974).

dangerous fleeing property crime suspects is discretionary.[15] The judgment below should be affirmed on this ground alone. The totally discretionary nature of the authority to shoot given Memphis police officers, resulting in disproportionate numbers of nonthreatening blacks being shot, is at war with the basic notion of equal protection of the laws. "For, the very idea that one man may be compelled to hold his life ... at the mere will of another, seems to be intolerable in any country where freedom prevails...." Yick Wo, 118 U.S. at 370.

CONCLUSION

For the foregoing reasons, the motion to affirm or dismiss in No. 83-1035 should be granted and the petition for a writ of certiorari in No. 83-1070 should be denied.

Respectfully submitted,

Steven L. Winter*
99 Hudson Street
New York, New York 10013
(212) 219-1900

Walter L. Bailey, Jr.
Suite 901, Tennke Building
161 Jefferson Avenue
Memphis, Tennessee 38103
(901) 521-1560

Attorneys for Respondent-Appellee

* Counsel of Record

---

[15] At the very least, the proffer established a prima facie case of discrimination shifting the burden to the city to rebut. Castaneda, 430 U.S. at 443-96. The district court's misunderstandings, suppositions, and attacks on the "bias" of the proffered expert testimony cannot suffice to fill this "evidentiary gap." Id. at 499.

APPELLANT'S BRIEF

Office - Supreme Court, U.S.
FILED
JUN 6
ALEXANDER L. STEVAS,
CLERK

No. 83-1035

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF TENNESSEE,
Appellant,

vs.

CLEAMTEE GARNER,
Appellee.

On Appeal from the United States Court of Appeals
for the Sixth Circuit

BRIEF FOR THE APPELLANT

WILLIAM M. LEECH, JR.
Attorney General & Reporter
State of Tennessee

JERRY L. SMITH
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-6439

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether Tennessee Code Annotated Sec. 40-7-108 is unconstitutional as repugnant to the Fourth and Fourteenth Amendments to the Constitution of the United States?

LIST OF PARTIES

The following parties appeared in the Court of Appeals:

Cleammer Garner, as father and next of kin of Edward Eugene Garner, a deceased minor,

(Plaintiff-appellant in the Court of Appeals, Appellee in this Court in No. 83-1035; Respondent in this Court in No. 83-1070).

The State of Tennessee,

(Appellee in the Court of Appeals, Appellant in this Court in No. 83-1035).

The City of Memphis; The Memphis Police Department,

Defendants-appellees in the Court of Appeals, Petitioners in this Court in No. 83-1070).

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement	3
Summary of Argument	6
Argument	
Tennessee Code Annotated Sec. 40-7-108 Is Not Unconstitutional Under The Fourth and Fourteenth Amendments To The United States Constitution	8
(A) The Common Law Rule Embodied In Tennessee Code Annotated Sec. 40-7-108 Is Not Violative Of The Fourth Amendment	9
(B) In Declaring Tennessee Code Annotated Sec. 40-7-108 Unconstitutional As Depriving The Fleeing Felony Suspect Of Life Without Due Process Of Law Under The Fourteenth Amendment, The Court Of Appeals Inappropriately Ennunciated A Constitutional Doctrine That Is More Appropriately A Policy Decision That Should Be Left To The Legislatures	13
(C) The Due Process Clause Of The Fourteenth Amendment Does Not Require Imposition Of The Rule Ennunciated By The Court Of Appeals Solely Because The Historical Underpinnings Of The Common Law Rule On Deadly Force Have Changed	17

Conclusion 19

TABLE OF AUTHORITIES

Page

Cases:

Ashcroft v. Mattis, 431 U.S. 171 (1977) 7,14

Bell v. Wolfish, 441 U.S. 520 (1979) 18

Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971) 10,12

Chimel v. California, 395 U.S. 752 (1969) 6,9

City of Columbus v. Fraley, 41 Ohio St.2d 173, 324 N.E.2d 735 11

Cunningham v. Ellington, 323 F.Supp. 1072 (W.D. Tenn. 1971) 15

Garner v. Memphis Police Department, 600 F.2d 52 (6th Cir. 1979) 5

Hilton v. State, 348 A.2d 242 (Me. 1975) 15

Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970) 13

Jones v. Marshall, 528 F.2d 132 (2nd Cir. 1975) 7,14,17,18

Kortum v. Alkine, 69 C.A.3d 325, 138 Cal. Rptr. 26 (1977) 14

Landrigan v. City of Warwick, 628 F.2d 736 (1st Cir. 1980) 10

Love v. Bass, 145 Tenn. 522, 238 S.W. 94 (1921) 8,11

Mattis v. Schnarr, 547 F.2d 1007 (8th Cir. 1976) 7,14,15,16

Miller v. State, 462 P.2d 421 (Alaska 1969) 12

Mincey v. Arizona, 437 U.S. 385 (1978) 6,10

Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) 5

Monroe v. Pape, 356 U.S. 167 (1961) 10

Reneau v. State, 70 Tenn. 720 (1879) 8

Scarborough v. State, 168 Tenn. 106 (1934) 8,11

State v. Boles, 598 S.W.2d 821 (Tenn. Crim. App. 1980) 8,11

State v. Mulvihill, 57 N.J. 151, 270 A.2d 277 (1970) 12

State v. Peters, 450 A.2d 332 (Vt. 1982) 11

State v. Richardson, 95 Idaho 446, 511 P.2d 263 (1973) . 12

State v. Sundberg, 611 P.2d 44 (Alaska 1980) 14

Terry v. Ohio, 392 U.S. 1 (1968) 10

Wiley v. Memphis Police Department, 548 F.2d 1247 (6th Cir. 1977) 15

Federal Statutory Authorities:

Fourth Amendment, U.S. Constitution 2,6,8,9,10

Fourteenth Amendment, Sec. 1, U.S. Constitution ..2,5,6,8,16

28 U.S.C. § 1254(2) 2

28 U.S.C. § 1331 4

28 U.S.C. § 1343(3) 4

28 U.S.C. § 2403(c) 5

42 U.S.C. § 1981 4

42 U.S.C. § 1983 4

42 U.S.C. § 1985 4

42 U.S.C. § 1986 4

42 U.S.C. § 1988 4

State Statutory Authorities:

Iowa Code §804.8 9

Minn. Stat. Ann. §607.7 9

Tennessee Code Annotated Sec. 40-7-108 ..... *passim*

Other Authorities:

Alaska Stat. § 11.81.370 9

Comment, Deadly Force to Arrest: Triggering Constitutional Review, 11 Harv. Civ. Rights - Civ. Lib. L. Rev. 360, n.30 (1976) 8

5 W. Blackstone, Commentaries at 292 (1803) (Tucker Ed.) 9

Model Penal Code Sec. 3.07(2)(b) 15

Mogin, The Policeman's Privilege to Shoot a Fleeing Suspect: Constitutional Limits on the Use of Deadly Force, 18 Am. Crim. L. Rev. 533 (1981) 9,19

II Pollock and Maitland, History of English Law, 464-466, (2d. Ed. 1959) 17

Ringel, Searches and Seizures, Arrests and Confessions, §23.7, pp. 23-29 (2ed 1982) 8

Sherman, Execution Without Trial: Police Homicide and the Constitution, 33 Vand. L. Rev. 71 (1980) .. 17

Tentative Drafts Nos. 8, 9, and 10, Model Penal Code, pp. 60-61 12

No. 83-1035

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF TENNESSEE,
Appellant,

vs.

CLEAMTEE GARNER,
Appellee.

On Appeal from the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR THE APPELLANT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, holding Tennessee Code Annotated Sec. 40-7-108 unconstitutional, was entered on June 16, 1983, and is reported at 710 F.2d 240 (6th Cir. 1983). (JS. App. p. A-1).* A suggestion for Rehearing En Banc was denied on September 26, 1983, and the order doing so is unreported. (JS. App. p. A-17).

---

* Reference to documents previously printed in the appendices to the Jurisdictional Statement in 83-1035 or the Petition For A Writ of Certiorari in 83-1070 will be referred to as (JS. App. p. ____) and (Pet. App. p. ____), respectively.

The opinion of the United States District Court for the Western District of Tennessee, after remand, dated February 29, 1980, and upholding the constitutionality of Tenn. Code Ann. §40-7-108, is unreported. (Pet. App. p. A-20).

The opinion of the United States Court of Appeals for the Sixth Circuit entered in the first appeal of the instant case is reported at 600 F.2d 52 (6th Cir. 1979). (Pet. App. p. A-15).

The memorandum opinion of the United States District Court for the Western District of Tennessee entered in the original trial of the instant case and dated September 29, 1976, is unreported. (Pet. App. p. A-1).

JURISDICTION

The judgment of the court of appeals declaring Tenn. Code Ann. §40-7-108 unconstitutional was entered on June 16, 1983. (JS. App. p. A-1). A Suggestion for Rehearing En Banc was denied on September 26, 1983. (JS. App. p. 17). Notice of Appeal to this Honorable Court was filed on October 26, 1983. (JS. App. p. A-18). This Court entered an order noting probable jurisdiction on March 19, 1984. The jurisdiction of this Court rests upon 28 U.S.C. §1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth Amendment, United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment, Sec. 1, United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Tennessee Code Annotated Sec. 40-7-108:

> Resistance of Officer — If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest.

STATEMENT

On the night of October 3, 1974, police were called to a residence at 739 Vollintine in Memphis, Tennessee. Upon their arrival, the officers dispatched to the residence were informed by a neighbor that "they are breaking in". One officer reported to his dispatcher while the other went toward the rear of the house. As he approached the back corner of the house, the officer heard a rear door slam and saw with the aid of a flashlight, the figure of a black male crouching next to a fence thirty (30) to forty (40) feet away. The officer was unable to ascertain whether the man was armed. (Pet. App. pp. A-2-A-4).

The officer shouted to the suspect to "halt" and he identified himself. The suspect, after a momentary pause, leaped to the top of the fence; and, with half his body over the top, the officer fired, fatally wounding the suspect. The officer stated he fired because he knew he would be unalbe to apprehend the suspect in any other manner. The officer was unfamiliar with the neighborhood and the terrain, was having difficulty getting through the cluttered back yard and because of his size and equipment, he did not think he could scale the fence which was six (6) to seven (7) feet high. The officer indicated it was dark

and he was concerned about the possibility of an armed accomplice in the residence. (Pet. App. pp. A-3, A-4, A-6, A-10-A-11)

The suspect who was killed turned out to be fifteen (15) year old Eugene Garner. Garner was unarmed and had a small amount of money and jewelry from the residence on his person. The residence was unoccupied at the time of the break-in although this was unknown to officers at the time of the shooting. (Pet. App. p. A-5, A-11)

On April 8, 1975, Cleamree Garner, the father of Eugene Garner, brought the instant action in the United States District Court for the Western District of Tennessee pursuant to 42 U.S.C. §§ 1981, 1983, 1985, 1986, 1988, and 28 U.S.C. §§1331, and 1343(3), seeking redress for the fatal shooting of Eugene Garner. Named defendants in the lawsuit were the Memphis Police Department; the City of Memphis, Tennessee; Wyeth Chandler, Mayor of the City of Memphis; Jay W. Hubbard, Director of Police for the City of Memphis; and E. R. Hyman, Police Officer of the City of Memphis. (App. pp. 4-6).

The suit alleged that Officer Hyman violated the constitutional rights of Edward Eugene Garner when Hyman shot and killed Garner in an attempt to apprehend him as Garner fled from the burglary of a private residence at 739 Vollintine, Memphis, Tennessee. The remaining defendants were joined on the grounds that their failure to exercise due care in the hiring, training, and supervision of defendant Hyman made them equally responsible for Garner's death and all defendants were sued on the grounds that their use or authorization to use the "hollow point" bullet further caused the deprivation of Garner's rights under the Constitution and Laws of the United States. (App. p. 6-19).

Trial was held on August 2-4, 1976, before the United States District Court for the Western District of Tennessee, the Honorable Harry W. Wellford, Judge, sitting without the intervention of a jury. At the conclusion of the plaintiff's proof on August 4, 1976, the district court granted a directed verdict for defendants Hubbard and Chandler, and a partial directed verdict as to the City of Memphis and the Memphis Police Department with respect to hiring practices.

On September 29, 1976, the district court found in favor of all defendants on all issues. On appeal, a panel of the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the district court dismissing the case against the individual defendants. However, the case was remanded as against the City of Memphis for reconsideration in light of this Court's opinion in *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). *See: Garner v. Memphis Police Department*, 600 F.2d 52 (6th Cir. 1979). (Pet. App. pp. A-1 - A-19).

On remand, the district court entered an order in favor of the City of Memphis and determined *inter alia* that Tennessee Code Annotated Sec. 40-7-108 was not violative of the cruel and unusual punishment prohibitions of the Eighth Amendment to the Constitution nor did the statute violate the due process provisions of the Fourteenth Amendment to the Constitution. (Pet. App. pp. A-20 - A-30).

Plaintiff-appellee again appealed to the United States Court of Appeals for the Sixth Circuit. During the pendency of this second appeal, the Clerk of the Court of Appeals notified the Office of the Attorney General of Tennessee that Tennessee Code Annotated Sec. 40-7-108 was under constitutional attack. Despite the provisions of 28 U.S.C. §2403(c), no prior notice of such an attack had been afforded the Office of the Attorney General of Tennessee. Pursuant to 28 U.S.C. §2403(c), the State of Tennessee, through the Office of the Attorney General, filed a motion to intervene in this case for the purpose of defending the constitutionality of Tennessee Code Annotated Sec. 40-7-108. The United States Court of Appeals for the Sixth Ci-

cuit granted the State of Tennessee's motion to intervene and permitted the State to file a brief on the issue. (JS. App. pp. A-1, A-11, A-12).

In an opinion delivered by the Honorable Gilbert S. Merritt, the United States Court of Appeals for the Sixth Circuit determined that Tennessee Code Annotated Sec. 40-7-108 was violative of the Fourth and Fourteenth Amendments to the United States Constitution. The panel of the Court of Appeals found that in so far as the statute would permit the use of deadly force against a non-dangerous fleeing felony suspect fleeing a non-violent felony, the statute permitted an unreasonable and excessive seizure of the person. The panel also held that the due process protections of the Fourteenth Amendment prohibit the use of deadly force to apprehend a non-violent fleeing felony suspect. The case was remanded for further proceedings consistent with the opinion. (JS. App. pp. A-1 - A-16)

The State of Tennessee filed a Suggestion for Rehearing En Banc in a timely fashion. Rehearing en banc was denied on September 26, 1983. Notice of Appeal to this Court was filed October 26, 1983. This Court noted probable jurisdiction on March 19, 1984.

SUMMARY OF ARGUMENT

(A)

The Fourth Amendment must be read largely as a reaction to abuses suffered by the colonists before the adoption of the Constitution. *See: Chimel v. California*, 395 U.S. 752, 760, 761 (1969). The common law rule respecting the use of deadly force was all recognized at the time of the adoption of the Constitution and has coexisted with the Fourth Amendment until the instant decision of the Court of Appeals. This belies any argument the Fourth Amendment was ever intended to prohibit the use of necessary deadly force to arrest for a felony. Traditional Fourth Amendment analysis in determining "unreasonableness" has focused on arbitrariness in the govern-

ment's intrusion or the necessity of the scope of it. Tennessee Code Annotated Sec. 40-7-108 is sufficiently narrow to prohibit the arbitrary or unnecessary use of deadly force. The Court of Appeals takes the unprecedented course of relating Fourth Amendment protections to the gravity of the crime involved a course this Court has previously rejected. *See: Mincey v. Arizona*, 437 U.S. 385, 393 (1978).

(B)

Almost every case which has previously considered the constitutionality of the common law rule respecting the use of deadly force as a last resort to effect an arrest, which is embodied in Tennessee Code Annotated Sec. 40-7-108, has upheld the validity of the rule in the face of a due process attack correctly concluding that the legislative branch of government is the proper forum to address to what extent the needs of effective law enforcement can be accomodated by more restrictive deadly force policies. *See: e.g. Jones v. Marshall*, 528 F.2d 132 (2nd Cir. 1975). Only one case has stricken a statute such as Tennessee's on due process grounds. *Mattis v. Schnarr*, 547 F.2d 1007 (8th Cir. 1976), vacated as moot *per curiam sub nom. Ashcroft v. Mattis*, 431 U.S. 171 (1977). Because of its ultimate disposition as moot *Mattis* is of only limited precedential value.

(C)

While the historical circumstances surrounding the origin of the common law rule respecting the use of deadly force may have changed, the State retains compelling interess in the apprehension of criminals which can only be served through the truly effective power of arrest. Thus, the mere change in historical circumstances does not warrant a constitutional doctrine renouncing the use of deadly force in all but life-threatening arrest situations, thereby giving some felons in effect the right to escape arrest.

ARGUMENT

Tennessee Code Annotated Sec. 40-7-108 Is Not Facially Unconstitutional Under The Fourth and Fourteenth Amendments To The United States Constitution.

Tennessee Code Annotated Sec. 40-7-108 permits police officers to use whatever force is reasonably necessary to effect the arrest of a suspect when police have probable cause to believe the suspect has committed a felony. The statute has been interpreted by the Tennessee courts to permit an officer to use deadly force as a last resort to effect a lawful arrest of a fleeing felon when no other means of apprehension is available; but, if the deadly force is unreasonably excessive to effect the capture of the suspect, then the officer may be subject to criminal liability. *Scarborough v. State*, 168 Tenn. 106 (1934); *Rowan v. State*, 70 Tenn. 720 (1879); *Love v. Bass*, 145 Tenn. 522, 238 S.W. 94 (1921); *State v. Boles*, 598 S.W.2d 821, 823 (Tenn. Crim. App. 1980). The Court of Appeals held the statute to be facially unconstitutional as permitting an unreasonable seizure of the person because the statute and case law made no differentiation between violent and non-violent fleeing felons. The Court of Appeals held that the Fourth and Fourteenth Amendments require not only probable cause to arrest a felony suspect, but also probable cause to believe the suspect is dangerous, or has committed a violent felony before deadly force may be used to effect the apprehension, even though the application of deadly force is necessary if the suspect is to be apprehended.

Sec. 40-7-108 appears to be a codification of the common law rule with respect to the use of deadly force to effect an arrest. Despite movement in several jurisdictions to a more restrictive rule of law in this area, adherence to the common law rule is still widespread.[1]

---

[1] Ringel, *Searches and Seizures, Arrests and Confessions*, §23.7, pp. 23-29 (2nd 1982); and Comment, *Deadly Force to Arrest: Triggering*

(A) The common law rule embodied in Tennessee Code Annotated Sec. 40-7-108 is not violative of the Fourth Amendment.

In declaring Sec. 40-7-108 unconstitutional as violative of the Fourth Amendment, and positing a constitutional doctrine requiring police to have probable cause to believe the fleeing felony suspect is dangerous or has committed a violent felony, the Court of Appeals has undertaken an unprecedented interpretation of Fourth Amendment protections. The common law rule respecting the use of deadly force was apparently the rule of law in England at the time of publication of the first edition of Blackstone's *Commentaries*. *See*: 5 W. Blackstone, *Commentaries* at 292 (1803) (Tucker Ed.); and was apparently well recognized at the time of the adoption of the United States Constitution. Magin, *The Policeman's Privilege to Shoot a Fleeing Suspect: Constitutional Limits on the Use of Deadly Force*, 18 Am. Crim. L. Rev. 333, 350 (1981). The long history of the common law rule's coexistence with the Fourth Amendment is of particular significance since the Fourth Amendment must be read in light of the abuses felt by the colonists to which the amendment was a reaction. *Chimel v. California*, 395 U.S. 752, 760, 761 (1969). Yet until the decision of the Court of Appeals in the instant case, no court, of which the appellant is aware, has held the common law rule respecting the use of deadly force runs afoul of the Fourth Amendment. Appellant submits this belies any argument the framers of the Constitution felt the common law rule respecting the use of deadly force was an abuse of government power.

Constitutional Review, 11 Harv. Civ. Rights — Civ. Lib. L. Rev. 360, 368 n.30 (1976); both indicate twenty-four (24) states adhere to the common law rule. However, Alaska, Minnesota, and Iowa appear to have amended their statutes to reflect a more restrictive use of deadly force to arrest. *See*: Alaska Stat. §11.81.370; Iowa Code §804.8; Minn. Stat. Ann. §607.7.

It is certainly true that the Fourth Amendment protects individuals from "unreasonable" seizures by police using the power of arrest. *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971); *Terry v. Ohio*, 392 U.S. 1 (1968); *Monroe v. Pape*, 365 U.S. 167 (1961); *Landrigan v. City of Warwick*, 628 F.2d 736 (1st Cir. 1980). However, the "reasonableness" under the Fourth Amendment of the seizure of a person appears to have traditionally been evaluated in terms of whether the police action was arbitrary, or the magnitude of the action was necessary in relation to the state interest served by the police conduct. *See: e.g. Terry v. Ohio*, *supra*, indicating brief seizure of suspect not arbitrary where there are reasonable grounds to believe criminal activity afoot and suspect is armed. Under *Terry*, a limited detention and search of the suspect for weapons is reasonable as necessary to protect the safety of officers and others.

But in the instant case, the Court of Appeals judges the "reasonableness" of a seizure by the use of deadly force on the basis of the gravity of the crime. Thus, the Court of Appeals engages in a Fourth Amendment analysis in the instant case which is both unprecedented and unwarranted. By relating Fourth Amendment protections to the gravity of the crime, the Court of Appeals opens a door this Court has heretofore been unwilling to take. *Mincey v. Arizona*, 437 U.S. 385, 393 (1978); 19 Am. Crim. L. Rev. 535 at 540 (1981).*

---

* Despite its analysis in relating Fourth Amendment protections to the gravity of the crime involved, the Court of Appeals would apparently allow the use of deadly force as a last resort to effect the apprehension of a suspect fleeing a relatively minor felonious assault involving violence, or to effect the arrest of an armed suspect fleeing some other relatively minor non-violent felony. On the other hand, an unarmed suspect fleeing a non-violent felony, though one deemed serious enough by society to merit lengthy punishment, such as treason or a triggering offense for recidivism, must be allowed to escape if he cannot be captured other than through deadly force. The

The common law rule codified by Sec. 40-7-108 is sufficient to protect the fleeing felon from the arbitrary or unnecessary police intrusions against which the Fourth Amendment stands guard. The statute permits an officer to use deadly force to effect a seizure of the person only if: (1) the officer has probable cause to believe the person fleeing has committed a felony, (2) the officer notifies the person fleeing that he intends to arrest the person, (3) the officer reasonably believes that no means less than deadly force can be used to prevent the escape of the person fleeing. *See: Scarborough v. State*, *supra*; *Love v. Bass*, *supra*; *State v. Boles*, *supra*.

The statute itself, therefore, insures that deadly force is not used by police arbitrarily or unnecessarily in effecting a lawful arrest. To conclude the Fourth Amendment requires as a precondition to the use of deadly force to effect an arrest, probable cause to believe the suspect is dangerous or has committed a violent felony ignores the practicalities of an arrest situation such as the instant case. The opinion offers no suggestion as to how officers who answer a call to a felony in progress, in the nighttime, in a situation requiring split-second decision making if the suspect is to be apprehended, are to gather sufficient information to establish probable cause to believe a fleeing suspect is dangerous or has committed a violent felony. The need to reduce violence in our society would be better served by the peaceful submission to arrest by suspects who have good reason to know the person seeking to arrest them is a law enforcement officer engaged in the performance of his duties, rather than by a constitutional doctrine which provides the opportunity for the swift felon to escape. *See: State v. Peters*, 450 A.2d 332 (Vt. 1982); *City of Columbus v. Fraley*, 41 Ohio St.2d

---

opinion also leaves open the possibility that in the future all police applications of force, deadly or not, will be measured for their reasonableness not by the necessity for the force but by the gravity of the crime involved.

173, 324 N.E.2d 735, *cert. den.*, 423 U.S. 872 (1975); *State v. Richardson*, 95 Idaho 446, 511 P.2d 263 (1973), *cert. den.*, 414 U.S. 1163 (1974); *State v. Mulvihill*, 57 N.J. 151, 270 A.2d 277 (1970); *Miller v. State*, 462 P.2d 421 (Alaska 1969); all indicating needs of a peaceful, law-abiding society promoted by peaceful submission to arrest by law enforcement officers.

As Professor Waite of the Model Penal Code's Advisory Committee noted in dissenting from the Model Penal Code's restrictive deadly force provisions:

> . . . only through truly effective power of arrest can law be satisfactorily enforced. obviously until violators are brought before the courts the law's sanctions cannot be applied to them . . . [E]ffectiveness in making arrests requires more than merely pitting the footwork of policemen against that of suspected criminals.

Tentative Drafts Nos. 8, 9, and 10, Model Penal Code, pp. 60-61.

Once a decision to arrest has been made by police, the citizen can legally do very little if anything to prevent government action to effect the arrest. *See: Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 394, 395 (1971). Thus the Fourth Amendment should stand guard against the unnecessary use of excessive force to effect the arrest. But the fleeing felony suspect can do a great deal to prevent the application of deadly force: he can stop his flight and peacefully submit to a lawful arrest thereby forestalling the necessity to use deadly force. The freedom from arbitrary and unnecessary interference from the government that the Fourth Amendment confers on citizens cannot reasonably be said to encompass a chance to outrun any police officer who lawfully attempts to apprehend him. To conclude otherwise grants an immunity to the fleeing felon he does not deserve, and results in society's sufferance of a risk it does not deserve.

The opinion of the court of appeals in the instant case cites *Jenkins v. Averett*, 424 F.2d 1228 (4th Cir. 1970); as the only case found by the court discussing Fourth Amendment limitations on the use of deadly force to capture a fleeing suspect. But, *Jenkins* does not begin to suggest the constitutional doctrine posited by the court of appeals in the instant case. In *Jenkins*, the fleeing suspect was unreasonably seized within the meaning of the Fourth Amendment for two (2) reasons. First, the facts of the case lead to the conclusion that officers had no probable cause to interfere with Jenkins's freedom of movement at all and thus had no lawful right to arrest him using any level of force. Secondly, the use of deadly force was both reckless and excessive because it was apparently not necessary to capture him. Thus, *Jenkins* does not deal with the situation presented in the instant case, i.e. a fleeing suspect whom officers have probable cause to believe has committed a felony, and who cannot be apprehended other than through the use of deadly force.

For the foregoing reasons, the State respectfully submits that Tennessee Code Annotated Sec. 40-7-108 which permits the use of deadly force only as a last resort to capture a fleeing felony suspect is not violative of the Fourth Amendment to the Constitution.

(B) In declaring Tenn. Code Ann. Sec. 40-7-108 unconstitutional as depriving the fleeing felony suspect of life without due process of law under the Fourteenth Amendment, the Court of Appeals inappropriately enunciated a constitutional doctrine that is more appropriately a policy decision that should be left to the legislatures.

The Court of Appeals in the instant case held Sec. 40-7-108 facially invalid under the due process clause of the Fourteenth Amendment. The court determined that in less than life threatening confrontations with police, the State has no compelling interest that would permit officers to use deadly force to

apprehend a fleeing felony suspect, i.e. deprive the suspect of his life without due process of law. The State respectfully submits the statute is not facially unconstitutional on this basis.

Almost every case which has previously considered the constitutionality of statutes similar to Sec. 40-7-108, or indeed Sec. 40-7-108 itself, on due process grounds has upheld the constitutionality of the statutes. Only the Eighth Circuit case of *Matris v. Schnarr*, 547 F.2d 1007 (8th Cir. 1976), vacated as moot *per curiam sub nom Ashcroft v. Matris*, 431 U.S. 171 (1977), *reh. den.*, 433 U.S. 915, is in accord with the holding of the Court of Appeals in the instant case.[6]

In *Jones v. Marshall*, 528 F.2d 132 (2nd Cir. 1975); the court upheld the validity of the Connecticut common law rule concerning the use of deadly force, which is virtually identical to Tenn. Code Ann. Sec. 40-7-108. Although expressing a belief that the privilege to use deadly force should as a matter of policy be restricted to situations where there is a violent crime or the fleeing suspect poses a serious threat of danger, the court declined to elevate this belief to a constitutional mandate. The court noted that the long history of the common law rule, the ready availability of weapons in our society, the widespread presence of violence and the changing needs of law enforcement made the policy decision one most properly entrusted to the legislatures where these factors could be weighed and debated.

On a previous occasion, the Sixth Circuit Court of Appeals has considered the constitutionality of Sec. 40-7-108 and has

[6] In *Kortum v. Alkire*, 69 C.A.3d 325, 138 Cal. Rptr. 26 (1977); *State v. Sandberg*, 611 P.2d 44 (Alaska 1960); the state courts interpreted their deadly force statutes to be limited in application to those fleeing violent felonies, or life-threatening situations but these courts did so on state law bases.

upheld its validity.[6] In *Wiley v. Memphis Police Department*, 548 F.2d 1247 (6th Cir. 1977); the Sixth Circuit found Sec. 40-7-108 [formerly [40-808], to comport with due process and roundly critized the contrary holding in *Matris v. Schnarr*, *supra*. as extending unwarranted protection to the felon at the expense of the public. Because the abolition of the privilege to use deadly force in certain felonies thereby allowing some felons to escape had such a serious impact on the protection of the citizenry, the Sixth Circuit at the time of *Wiley* thought the question of the privilege to use deadly force one better left for the legislative branch. 548 F.2d at 1252. *See also: Cunningham v. Ellington*, 323 F.Supp. 1072 (W.D. Tenn. 1971) (three-judge court); upholding the constitutionality of Tennessee's deadly force rule.

In *Hilton v. State*, 348 A.2d 242 (Me. 1975); the Supreme Judicial Court of Maine reversed the holding of a lower appellate court which abrogated the common law rule of Maine with regard to the use of deadly force to arrest in favor of the Model Penal Code's more restrictive deadly force policy.[7] In holding such public policy changes were better left to the legislature, the court said of the actions of the lower court:

> In effect, it undertook to formulate a new public policy for the State of Maine in an area in which the delicacies of the balancing of values, the strongly held differing attitudes among segments of the populace and the potential for

[6] Despite protestations to the contrary in the opinion of the Court of Appeals in the instant case, the Sixth Circuit case cited in the text above clearly upholds the constitutionality of Sec. 40-7-108 in the face of a due process attack.

[7] *See*: Model Penal Code Sec. 3.07(2)(b); restricting use of deadly force to violent felony situations or where there is substantial risk of violence by suspect if apprehension is delayed.

> enormous impact upon the public welfare strongly point to the propriety of judicial restraint, and an acknowledgement that inadequacies, if any, in the common law as presently operative should be left to the Legislature to evaluate and remedy.

348 A.2d at p. 245.

In *Mattis v. Schnarr*, *supra*, the Eighth Circuit Court of Appeals by a single vote in an *en banc* hearing held a Missouri statute similar to Sec. 40-7-108 to be violative of the due process clause of the Fourteenth Amendment in so far as it would permit the use of deadly force against fleeing felony suspects who were ultimately determined to be non-dangerous. In a strongly worded well-reasoned dissent three (3) judges of the Eighth Circuit found the question of when deadly force should be applied was one of public policy that should be entrusted to the legislature, not made a rule of constitutional magnitude. The dissent also pointed out that such a rule of constitutional law placed extraordinary burdens on police in emergency situations. In discussing the standard enunciated in *Mattis* for the use of deadly force, which is similar to the one announced by the Court of Appeals in the instant case the dissent, per Chief Judge Gibson stated:

> This standard presupposes that law enforcement officers are endowed not only with foresight, but also with that most characteristic judicial vision, hindsight. The majority does not suggest how law enforcement officers are to make the on-the-spot constitutional analysis called for by its proposal and still react quickly enough to meet the exigencies of an emergency situation. How can a police officer ever know, reasonably or otherwise, whether the felon will use force against others if not immediately apprehended? It is clearly the perogative of the state legislatures to decide whether such restrictions on the use of deadly force are consonant with public policy.[9]

[9] 347 F.2d at 1023.

The state's interests in this area it is respectfully submitted are compelling, and include effective law enforcement, the apprehension of criminals, the prevention of crime and protection of the general public.[7] The ready availability of handguns in our society and widespread violence indicate that to what extent the state's interest can be served while protecting the fleeing felon's right to life is a matter better entrusted to the state legislatures, than made a rule of constitutional law to which all states would be subject.[8]

(C) The due process clause of the Fourteenth Amendment does not require imposition of the rule enunciated by the Court of Appeals solely because the historical underpinnings of the common law rule on deadly force have changed.

The opinion of the Court of Appeals takes as its premise for promulgating a constitutional doctrine on the use of deadly force to arrest, that the historical underpinnings surrounding the growth of the common law rule on deadly force have changed.[9] (JS. App. p. A-8). It is true that some scholars have suggested that the common law rule regarding the use of deadly force had its origin at a time when only violent crimes were felonies and all were punishable by death.[10] The Court of Appeals reasons that because this is no longer the case with felonies, evolving standards of decency require a constitutional doctrine renouncing the use of deadly force except for felonies police have probable cause to believe involve violence or danger.[11] (JS. App. p. A-8)

[7] *Id.*

[8] *Jones v. Marshall*, 528 F.2d 132, 140.

[9] 710 F.2d at 243-245.

[10] II Pollock and Maitland, *History of English Law*, 466-468, 578-80 (2d. Ed. 1898); Sherman, *Execution Without Trial: Police Homicide and the Constitution*, 33 Vand. L. Rev. 71 (1980).

[11] 710 F.2d at 244.

This reasoning assumes that the application of deadly force to arrest is really punishment. As such, it can only be imposed without due process guarantees such as a trial when there is a threat to life. But if the killing of a non-violent fleeing felony suspect deprives the supect of constitutional guarantees, it does so no less with the fleeing violent offender.[12] Yet no one seriously argues that police should not be privileged to use deadly force to arrest in a situation fraught with actual violence or the potential violence. The answer to this argument is that the use of deadly force as a last resort to effect the arrest of a fleeing felon is not punishment. The resultant disability to the fleeing fugitive is imposed not for the purpose of punishing him, but as a necessary incident to the government's compelling interests in the apprehension of criminals, the prevention of crime and the protection of the public. This Court has previously indicated that not every pre-trial disability imposed on a criminal suspect is punishment; the test is whether the disability is imposed for the purpose of punishment or for the vindication of some other legitimate government interest. *Bell v. Wolfish*, 441 U.S. 520, 537, 538 (1979).

Appellant does not mean to suggest that because the application of deadly force is not punishment it can be arbitrarily or unnecessarily utilized. But Sec. 40-7-108 as interpreted by the Tennessee courts restricts the use of such force only to when it is necessary to effect the apprehension. This necessity is often created by the felon himself who refuses to peacefully submit to a lawful arrest. It is respectfully submitted the limited circumstances under which Sec. 40-7-108 itself permits the use of deadly force are sufficient to adequately accommodate the fleeing suspect's right to life; the suspect has but to obey the order to halt to prevent the use of deadly force.

---

[12] *Jones v. Marshall*, *supra*, 528 F.2d at 136 n.9., rejecting the reasoning adopted by the Court of Appeals in the instant case.

A change in the historical factors giving origin to the common law rule does not mandate the adoption of the constitutional doctrine announced by the Court of Appeals. To adopt that deadly force doctrine gives the felon an unjustified opportunity to escape apprehension, while failing to sufficiently accommodate the compelling interests of the state in apprehending him. Unlike the days of the early common law, the modern police officer cannot count of the general citizenry to respond to the "hue and cry" of the common law by which the public was obliged to aid in the capture of fleeing suspects.[13] Only through the privilege to use deadly force as a last resort to effect the capture of a fleeing suspect is the power to arrest truly effective. It would appear to be common sense that an officer's order to "stop or I'll shoot" enhances the likelihood that suspects will submit to arrest, if that order is believed.[14]

CONCLUSION

For the reasons set forth above, the Appellant respectfully requests that the decision of the Sixth Circuit Court of Appeals be reversed.

Respectfully submitted,

WILLIAM M. LEECH, JR.
Attorney General & Reporter
State of Tennessee

JERRY L. SMITH
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-6439

---

[13] *See* 35 Vand. L. Rev. 71 at 74, n. 14, citing 4 W. Blackstone, *Commentaries* at 293.

[14] Magin, *The Policeman's Privilege to Shoot a Fleeing Suspect: Constitutional Limits on the Use of Deadly Force*, 18 Am. Crim. L. Rev. 533 (1981).

JOINT

APPENDIX

Office - Supreme Court, U.S.
FILED
JUN 9 1984
ALEXANDER L. STEVAS
CLERK

Nos. 83-1035 and 83-1070

In the Supreme Court of the United States

October Term, 1983

STATE OF TENNESSEE,
Appellant,

vs.

CLEAMTEE GARNER, et al.,
Appellees.

AND

MEMPHIS POLICE DEPARTMENT, et al.,
Petitioners,

vs.

CLEAMTEE GARNER, et al.,
Respondents.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

(Counsel on Inside Cover)

Appeal Filed December 21, 1983
Petition for Writ of Certiorari Filed December 27, 1983
Probable Jurisdiction Noted March 19, 1984
Certiorari Granted March 19, 1984

E. L. MENSENDIEK, INC., 625 Cherry Street, Kansas City, Mo. 64106, (816) 421-8080

BEST AVAILABLE COPY

HENRY L. KLEIN (*Counsel of Record*)
Staff Attorney
1500 First Tenn. Bank Building
Memphis, Tennessee 38103
(901) 523-2363
Attorney for Petitioners

STEVEN L. WINTER
10 Columbus Circle, Suite 2030
New York, New York 10019
Attorney for Appellees-Respondents

WILLIAM M. LEECH, JR.
Attorney General of Tennessee
450 James Robertson Parkway
Nashville, Tennessee 37219
Attorney for Appellant

TABLE OF CONTENTS

Relevant Docket Entries 1
Complaint filed April 8, 1975 4
Answer of Defendants filed September 18, 1975 19
Judgment on Decision entered March 3, 1980 25
Judgment filed July 8, 1981 26
Testimony of Cleamtee Garner (pp. 8-9, 18-19) 27
Testimony of Talton Douglas Enoch (pp. 46, 62-63) 30
Testimony of Leedell Anderson (pp. 92-94, 104-105) 32
Testimony of Elton Richard Hymon (pp. 129, 133-134, 145-146, 157, 170-171, 177, 185-186, 188, 190-193, 574, 613-630, 633, 644-646) 35
Testimony of Eugene L. Barksdale (pp. 303, 317-318) 60
Testimony of John A. Coletta (pp. 132, 204) 62
Testimony of Dr. J. T. Francisco (pp. 225, 229-230, 235, 262-263) 63
Testimony of Velton J. Rogers (pp. 655, 657-660, 664-665) 67
Testimony of Jay W. Hubbard (pp. 577, 593, 595) 72
Testimony of Leslie Burton Wright (pp. 672, 674, 677-681, 694-695) 74
Testimony of F. J. Wheeler (pp. 697, 701-702) 79
Affidavit of William R. Bracey 81
Affidavit of Lawrence W. Sherman 90
Affidavit of James J. Fyfe 97
Deposition of Wyeth Chandler (pp. 4, 6, 9-15, 21-22, 27) 107
Deposition of E. Winslow Chapman (pp. 4, 12-16, 18-20, 27, 29-35, 42-47, 49-54, 60-66) 115
Memphis Deadly Force Policy dated February 5, 1974 140
Memphis Deadly Force Policy dated July 16, 1979 145

RELEVANT DOCKET ENTRIES

Date	NR.	Proceedings
4- 8-75	1	Complaint
5-23-75	3	Motion to Dismiss in Behalf of Defendants
5-23-75	4	Memorandum in Support of Motion to Dismiss
6-10-75	6	Plaintiff's Memorandum in Opposition To Motion to Dismiss of Defendants, Memphis Police Department, City of Memphis, Wyeth Chandler, Jay W. Hubbard and E. R. Hymon.
8-18-75	7	Order on Motion to Dismiss
9-16-75	8	Answer of Defendants
7-12-76	37	Memorandum of Points and Authorities of Plaintiff Cleamtee Garner
7-12-76	38	"Corrected Copy" of Memorandum of Points and Authorities of Plaintiff Cleamtee Garner
8-23-76	49	Defendants' Proposed Findings of Fact and Conclusions.
8-30-76	50	Plaintiff's proposed findings of fact and conclusions of law
9- 7-76	51	Order on Motions for Directed Verdict
9- 7-76	52	Judgment on Decision by the Court
9-29-76	53	Memo Op. Judgment in favor of all defendants rendered
9-30-76	54	Judgment on decision by the Court - dismissing case

10-27-76	56	Notice of Appeal - of plaintiff
1-17-77	58	Court Reporter's Transcript of Trial - Six (6) volumes
1-17-77		CERTIFIED RECORD MAILED TO COURT OF APPEALS - 7 vols of transcript; 9 depos.
7-19-79	59	MANDATE AND OPINION FROM COURT OF APPEALS, CASE REVERSED AND REMANDED FOR FURTHER PROCEEDINGS AS TO THE CITY OF MEMPHIS, AFFIRMED AS TO INDIVIDUALS, CERTIFIED RECORD ALSO ENCLOSED
8-13-79	60	ORDER (Parties invited w/in 40 days to submit memo as to whether further hearing & trial necessary and/or whether questions may be resolved on the record with opportunity for submission of briefs & memo and argument)
9-21-79	63	MEMORANDUM SUBMITTED BY DEFENDANTS
10-10-79	64	PLTF'S MEMO IN SUPPORT OF NECESSITY FOR FURTHER HEARINGS
10-16-79	65	ORDER, oral hearing set 11-30-79, 10 AM
10-24-79	67	ORDER-Above motion GRANTED
1-15-80	69	MEMORANDUM
1-24-80	70	SUPPLEMENTAL MEMORANDUM SUBMITTED BY DEFTS
2- 7-80	71	PLTF'S RESPONSE TO SUPPLEMENTAL MEMO SUBMITTED BY DEFTS

3- 3-80	72	ORDER (CRT CONCLUDES THAT JUDGMENT SHOULD ISSUE FOR DEFTS, INCLUDING CITY & POLICE DEPT. IN LIGHT OF MONELL)
3- 3-80	73	JUDGMENT ON DECISION BY THE COURT (Per Order entered 3-3-80, JUDGMENT ENTERED FOR DEFTS; CASE DISMISSED)
3-11-80	74	MOTION FOR RECONSIDERATION W/MEMO IN SUPPORT ATTACHED
4-29-80	75	ORDER - Judgment for defendant suspended pending further consideration in light of contention that plaintiff was not given full opportunity to brief & argue merits
6-24-80	77	PLAINTIFF'S MEMORANDUM OF LAW W/15 ATTACHMENTS FURNISHED W/ORIGINAL ONLY (NOTE: MEMO & ATTACHMENTS FILED IN SEPARATE FOLDERS -2)
7-30-80	78	DEFT'S RESPONSE TO PLTF'S MEMO #77
7- 8-81	79	ORDER - judgment is rendered for City of Memphis.
7-13-81	80	JUDGMENT ON DECISION BY THE COURT
8- 7-81	81	NOTICE OF APPEAL
8- 7-81		MAILED TRANSMISSION FORM TO COURT OF APPEALS
8-21-81		MAILED CERTIFIED RECORD TO COURT OF APPEALS

(Filed April 8, 1975)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF TENNESSEE
WESTERN DIVISION

CIVIL ACTION
No. C-75-145

CLEAMTEE GARNER, father and next of kin of
EDWARD EUGENE GARNER,
a deceased minor,
Plaintiff,

vs.

MEMPHIS POLICE DEPARTMENT; CITY OF MEMPHIS, Tennessee; WYETH CHANDLER, Mayor of Memphis; JAY W. HUBBARD, Director of Police of Memphis; and E.R. HYMON, Police Officer of the City of Memphis,
Defendants.

COMPLAINT

1. On October 3, 1974, Edward Eugene Garner, a 15 year old black citizen of the United States and of the State of Tennessee, residing in the City of Memphis, Shelby County, Tennessee, was shot and killed by an officer of the Memphis, Tennessee Police Department. At the time the officer shot and killed Garner, he was acting under color of the statutes, ordinances, regulations, customs and usages of the State of Tennessee, County of Shelby, and City of Memphis.

JURISDICTION

2. This is an action for damages brought pursuant to 42 U.S.C. §§ 1981, 1983, 1985, 1986 and 1988 to redress the deprivation of the rights, privileges and immunities of Plaintiff's deceased son, Edward Eugene Garner, secured by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Jurisdiction is conferred on this Court by 28 U.S.C. § 1343(3) and 28 U.S.C. § 1331. The matter in controversy exceeds the sum or value of $10,000.00, exclusive of interests and costs.

3. The shooting and killing of Edward Eugene Garner by a police officer of the City of Memphis also deprived the deceased of rights, privileges and immunities secured him by the Constitution and laws of the State of Tennessee. This action, therefore, seeks damages for wrongful death and survival and also with respect to violations of the deceased's state-conferred rights through exercise of this Court's pendent jurisdiction.

Parties

4. Plaintiff Cleamtee Garner is an adult black citizen of the United States and the State of Tennessee, residing in Memphis, Shelby County, Tennessee. Plaintiff is father and next of kin of Edward Eugene Garner, deceased minor, who died on October 3, 1974 as a result of defendants' policies, practices, customs and usages complained of herein. At the time of his death, Edward Eugene Garner, resided with plaintiff and was fifteen years old.

5. All of the individual defendants are citizens of the United States and the State of Tennessee, residing in Memphis, Shelby County, Tennessee. The defendants are as follows:

(a) The Memphis Police Department is a department or agency of the City of Memphis and is charged by law

with the law enforcement responsibilities of the City of Memphis. The Department has a duty to operate in a lawful manner so as to preserve to the citizens of Memphis the rights, privileges and immunities guaranteed and secured to them by the Constitution and laws of the United States.

(b) The City of Memphis is a municipal corporation organized and existing under the laws of the State of Tennessee. The City, pursuant to law, operates the defendant Memphis Police Department, which the City has the duty to operate in conformity with the Constitution and laws of the United States.

(c) Wyeth Chandler is Mayor of the City and, as such, is the City's chief executive officer. Defendant Chandler is responsible for all policies and practices and actions or omissions of the Department and its members and has the duty to preserve to all citizens the rights, privileges and immunities secured by the Constitution and laws of the United States. Prior to becoming Mayor, on January 1, 1972, defendant Chandler was a member of the Memphis City Council, the City's legislative body.

(d) Jay W. Hubbard is and was, at all times relevant herein, Director of Police of Memphis. In that capacity as chief executive officer of the Memphis Police Department, he is responsible for establishing general practices, procedures and policies with respect to the operation of that Department. Pursuant to that authority he has promulgated regulations relating to the use of lethal force by Memphis officers and has authorized the use of weaponry and ammunition by police officers both of which acts are complained of herein. Defendant Hubbard is sued individually and in his official capacity with the Department.

(e) Defendant E.R. Hymon is sued individually and in his official capacity. At all times relevant, he was an officer of the City of Memphis Police Department. He is a citizen of the United States and of the State of Tennessee, residing in the City of Memphis.

First Claim for Relief

6. On information and belief, since February 5, 1974, officers of the Department have been authorized by City and Department officials to employ deadly force in the following circumstances after all other reasonable means to apprehend or otherwise prevent the offense have been exhausted:

a) defense of themselves or others when confronted with real and immediate threats of serious bodily harm or death;

b) where the offense involves a felony and the suspect uses or attempts to use or threatens the use of physical force against any person; and

c) where the offense involved is (1) kidnapping, (2) murder in the 1st or 2nd degree, (3) manslaughter, (4) arson, (5) rape, (6) assault and battery with intent to carnally know a child under 12 years of age, (7) assault and battery with intent to commit rape, (8) burglary in the 1st, 2nd or 3rd degree, (9) assault to commit murder in the 1st or 2nd degree, (10) assault to commit voluntary manslaughter, or (11) armed and simple robbery.

7. On information and belief, police officers of the Department are issued .38 Smith & Wesson Special revolvers for use in the carrying out of their official responsibilities.

8. On information and belief, since the latter part of 1973, police officers of the Department have been issued Remington 125 grain jacketed hollow-point bullets for use in .38 revolvers in the exercise of their official duties.

9. The Remington 125 grain jacketed hollow-point bullet is a member of a class of projectiles commonly referred to as "Dum-Dum" bullets. Named after an arsenal near Calcutta, India where bullets of this type were first made, "Dum-Dum" bullets possess the very special quality of expanding and flattening more easily in the human body than do traditional cartridges for .38 revolvers.

10. Because of the expanding and flattening quality of such bullets upon entering the human body they, unlike traditional cartridges, do not exit immediately but tend, instead, to expend their enormous force within the body. This tendency to expend force within the body means that persons wounded by such bullets in the head or torso areas will undoubtedly suffer grievous bodily harm or death.

11. Because of the devastating effect of "Dum-Dum" type bullets upon the human body, their use has been outlawed in international warfare as violative of bans in various international agreements against "projectiles or materials of a nature to cause superfluous injury" (Hague Convention on Land Warfare of 1899), "arms, projectiles, or materials calculated to cause unnecessary suffering" (Hague Convention on Land Warfare of 1907 and the Oxford Manual of Naval War of 1913) among others, and prohibited by regulations of the United States military for use in warfare.

12. On information and belief, on or about October 3, 1974, Edward Eugene Garner was observed by E.R. Hymon behind a residence located at Vollintine in the City of Memphis at about 11 P.M. in the evening.

13. On information and belief, defendant E.R. Hymon, ordered the deceased, Garner, to halt, as the deceased was in the process of approaching or actually climbing a 6-foot cycline fence that extended the length of the area behind the residence at 739 Vollintine.

14. When the deceased Garner, who at the time of his death was about five feet tall and under 100 pounds in weight, did not respond to defendant Hymon's order, the defendant Hymon shot the deceased in the back of the head with a Remington 125 grain jacketed hollow-point bullet from his service revolver.

15. Edward Eugene Garner expired at the scene of the shooting shortly after sustaining the gun-shot wound to the back of his head.

16. On information and belief, the deceased, Garner, was unarmed at the time he was mortally wounded by defendant Hymon.

17. In using his service revolver armed with "Dum-Dum" type bullets, defendant E.R. Hymon knew or should have known that his apprehension of Edward Eugene Garner would be effected only at the cost of severely wounding, maiming or killing the fleeing youth and would prevent, under normal circumstances, Garner's being subjected to the due process protections of being formally charged, tried by a court or jury, and, if guilty, punished by incarceration or probation. Defendant E.R. Hymon knew or should have known, that his shooting of Garner would inflict summary capital punishment, a penalty which even a court of law could not impose consonant with the Eighth and Fourteenth Amendments at the time the incident in question occurred.

18. The wounding and killing of the deceased, Garner, by defendant, Hymon, constituted a wanton, willful, ma-

licious and/or negligent violation of the deceased's right not to be subjected to summary punishment and death at the hands of a law enforcement officer, but rather to be charged and tried before a court of law and convicted, if guilty, for any crimes he allegedly committed as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, specifically by the Due Process Clauses of the Fifth and Fourteenth Amendments.

19. The wounding and killing of the deceased, Garner, by defendant, Hymon, constituted a wanton, willful, malicious and/or negligent violation of the deceased's right not to be subjected to unreasonable seizures of his body as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution. In view of the fact that the deceased was unarmed and posed no threat to the life or person of the defendant, Hymon, or any third person, the officer's resort to lethal force was unnecessary and unreasonable, designed not to apprehend the deceased, but rather to cause his death or grievous bodily harm to him.

20. The wounding and killing of the deceased, Garner, by defendant, Hymon, constituted a wanton, willful, malicious and negligent violation of the deceased's right not to be subjected to cruel and unusual punishment as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution in that the lethal force used by defendant, Hymon, was unreasonable and unnecessary to apprehend the deceased. Instead, the force used was excessive in that the natural and reasonable consequence of its application to the deceased was death or grievous bodily harm.

21. As a result of his wounding, the deceased, Garner, suffered and was forced to endure intense pain and suffering prior to succumbing to the mortal damage sustained by his body.

22. The wounding and killing of the deceased, Garner, by defendant, Hymon, occurred because the deceased was black, that is to say, lethal force would not have been resorted to under the circumstances had the deceased been white. In that regard, the deceased was deprived of his right to equal protection of the laws irrespective of race as guaranteed by the Fourteenth Amendment to the United States Constitution and by 42 U.S.A. § 1981.

Second Claim for Relief

23. Plaintiff reasserts and realleges paragraphs 6 through 22 above.

24. The wounding and killing of the deceased, Garner, by defendant, Hymon, in violation of the deceased's rights guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution was a direct and proximate result of the defendant, Memphis Police Department's hiring of defendant, Hymon, despite the fact that it knew or should have known that defendant, Hymon, was unsuited to perform the duties of a law enforcement officer and that his employment in that capacity would result in his causing grievous bodily injury or death to persons in the City of Memphis.

25. The wounding and killing of the deceased, Garner, by defendant, Hymon, in violation of the deceased's rights guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution was a direct and proximate result of the defendant, Memphis Police Department's hiring defendant, Hymon, as a law enforcement officer with the authority and capacity to cause grievous bodily injury to persons in the City of

Memphis without providing him with adequate training in the use of weapons generally and in the proper use of non-lethal and lethal force in making apprehensions.

26. The wounding and killing of the deceased, Garner, by defendant, Hymon, in violation of the deceased's rights guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution was a direct and proximate result of the defendant, Memphis Police Department's hiring defendant, Hymon, as a law enforcement officer with the authority and capacity to cause death or grievous bodily harm to persons in the City of Memphis without providing him with adequate training in the use of weapons generally and in the proper use of non-lethal and lethal force in making apprehensions and, in reckless and negligent disregard for his lack of training, issuing him "Dum-Dum" type bullets, the use of which could result only in death or grievous bodily injury.

27. The wounding and killing of the deceased, Garner, by the defendant, Hymon, in violation of the deceased's rights guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution was a direct and proximate result of defendant, Memphis Police Department's (a) providing authorization to officers such as defendant Hymon to shoot to prevent the escape of persons suspected of committing certain non-violent felonies but who pose no threat to the life or physical safety of the officer or of third persons and (b) arming such officers with "Dum-Dum" type bullets that assure that the alleged felon will be grievously wounded or killed instantly obviating any possibility that the suspect will be brought to justice in accordance with accepted notions of due process. In so doing, the defendant, Memphis Police Department, authorized the imposition of summary

punishment not the apprehension of criminal suspects for disposition by the legal process.

28. As a consequence of the reckless and negligent conduct of the defendant, Memphis Police Department, as set forth in paragraphs 24 to 27 above, the defendant, Hymon, resorted to the use of lethal force where non-lethal force was appropriate, mortally wounding the deceased, Garner.

Third Claim for Relief

29. Plaintiff reasserts and realleges paragraphs 6 through 22 above.

30. The wounding and killing of the deceased, Garner, by defendant, Hymon, in violation of the deceased's rights guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution was a direct and proximate result of the defendant, Jay W. Hubbard's hiring of defendant, Hymon, despite the fact that defendant, Hubbard, knew or should have known that defendant, Hymon, was unsuited to perform the duties of a law enforcement officer and that his employment in that capacity would result in his causing grievous bodily injury or death to persons in the City of Memphis.

31. The wounding and killing of the deceased, Garner, by defendant, Hymon, in violation of the deceased's rights guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution was a direct result of defendant, Jay W. Hubbard's hiring defendant, Hymon, as a law enforcement officer with the authority and capacity to cause death or grievous bodily injury to persons in the City of Memphis without providing him with adequate training in the use of weapons generally and in the proper use of non-lethal and lethal force in making apprehensions.

32. The wounding and killing of the deceased, Garner, by defendant, Hymon, in violation of the deceased's rights guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution was a direct and proximate result of defendant, Jay W. Hubbard's hiring defendant, Hymon, as a law enforcement officer with the authority and capacity to cause death or grievous bodily harm to persons in the City of Memphis without providing him with adequate training in the use of weapons generally and in the proper use of non-lethal and lethal force in making apprehensions and, in reckless and negligent disregard for his lack of training, issuing him "Dum-Dum" type bullets for his use on duty, the use of which could result only in death or grievous bodily injury.

33. The wounding and killing of the deceased, Garner, by the defendant, Hymon, in violation of the deceased's rights guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution was a direct and proximate result of defendant, Jay W. Hubbard's (a) providing authorization to officers such as defendant Hymon to shoot to prevent the escape of persons suspected of committing certain non-violent felonies but who pose no threat to the life or physical safety of the officer or of third persons and (b) arming such officers with "Dum-Dum" type bullets that assure that the alleged felon will be grievously wounded or killed instantly obviating any possibility that the suspect will be brought to justice in accordance with accepted notions of due process. In so doing, the defendant, Jay W. Hubbard, authorized the imposition of summary punishment not the apprehension of criminal suspects for disposition by the legal process.

34. As a consequence of the reckless and negligent conduct of the defendant, Jay W. Hubbard, as set forth

in paragraphs 30 to 33 above, the defendant, Hymon, resorted to the use of lethal force where non-lethal force was appropriate, mortally wounding the deceased, Garner.

Fourth Claim for Relief

35. Plaintiff reasserts and realleges paragraphs 6 through 22 above.

36. The wounding and killing of the deceased, Garner, by defendant, Hymon, in violation of the deceased's rights guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution was a direct and proximate result of the defendant, City of Memphis' hiring of defendant Hymon, despite the fact that defendant City of Memphis knew or should have known that defendant, Hymon, was unsuited to perform the duties of a law enforcement officer and that his employment in that capacity would result in his causing grievous bodily injury or death to persons in the City of Memphis.

37. The wounding and killing of the deceased, Garner by defendant, Hymon, in violation of the deceased's rights guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution was a direct result of defendant City of Memphis' hiring defendant Hymon as a law enforcement officer with the authority and capacity to cause death or grievous bodily injury to persons in the City of Memphis without providing him with adequate training in the use of weapons generally and in the proper use of non-lethal force in making apprehensions.

38. The wounding and killing of the deceased, Garner, by defendant, Hymon, in violation of the deceased's rights

guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution was a direct and proximate result of defendant, City of Memphis' hiring defendant Hymon as a law enforcement officer with the authority and capacity to cause death or grievous bodily harm to persons in the City of Memphis without providing him with adequate training in the use of weapons generally and in the proper use of non-lethal and lethal force in making apprehensions and, in reckless and negligent disregard for his lack of training, issuing him "Dum-Dum" type bullets for his use on duty, the use of which could result only in death or grievous bodily injury.

39. The wounding and killing of the deceased Garner, by defendant, Hymon, in violation of the deceased's rights guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution was a direct result of defendant City of Memphis' (a) providing authorization to officers such as defendant Hymon to shoot to prevent the escape of persons suspected to committing certain non-violent felonies but who pose no threat to the life or physical safety of the officer or of third persons and (b) arming such officers with "Dum-Dum" type bullets that assure that the alleged felon will be grievously wounded or killed instantly obviating any possibility that the suspect will be brought to justice in accordance with accepted notions of due process. In so doing, the defendant, City of Memphis, authorized the imposition of summary punishment not the apprehension of criminal suspects for disposition by the legal process.

40. As a consequence of the reckless and negligent conduct of the defendant, City of Memphis, as set forth in paragraphs 36 to 39, the defendant Hymon resorted to the use of lethal force where non-lethal force was appropriate, mortally wounding the deceased, Garner.

Fifth Claim for Relief

41. Plaintiff reasserts and realleges paragraphs 6 through 22 above.

42. The wounding and killing of the deceased, Garner, by defendant, Hymon, in violation of the deceased's rights guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution was a direct and proximate result of defendant Wyeth Chandler's publicly expressed support for and approval of, as a member of the City Council and since becoming Mayor of the City Council, shooting by officers of the Memphis Police Department to prevent the escape of persons suspected of committing certain non-violent felonies but who pose no threat to the life or physical safety of the officer or of third persons despite the fact that he knew or should have known that: (a) The Memphis Police Department was hiring persons as police officers who were unsuited to perform the duties of law enforcement officers and whose hiring would result in their improperly causing grievous bodily injury or death to persons in the City of Memphis; (b) The Memphis Police Department was hiring persons as police officers with the authority and capacity to cause death or grievous bodily injury to persons in the City of Memphis without providing them with adequate training in the use of weapons generally and in the proper use of non-lethal and lethal force in making apprehensions; (c) The Memphis Police Department was arming police officers with "Dum-Dum" type bullets, the use of which could result only in death or grievous bodily injury, thereby preventing any disposition of an alleged felon in accordance with accepted notions of due process.

43. In publicly supporting the shooting by police officers of the Memphis Police Department to prevent the escape of persons suspected of committing certain non-

violent felonies but who pose no threat to the life or physical safety of the officer or of third persons, despite the factors mentioned in 42(a) through (c) above, defendant Wyeth Chandler placed the prestige and authority of his office as City Councilman and later Mayor of Memphis behind the imposition of summary capital punishment by Memphis police officers which official policy was in fact effectuated in the case of the deceased, Garner, as a result of his shooting by defendant, Hymon.

Pendent Claim

44. Plaintiff reasserts and realleges paragraphs 1 through 43 above.

45. The foregoing acts of defendants Hymon, Memphis Police Department, City of Memphis, Hubbard and Chandler which resulted in the death of plaintiff's son, Edward Eugene Garner, also violated the Constitution and laws of the State of Tennessee, including but not limited to TENN. Code Ann. § 40-808, as authoritatively construed by the courts of Tennessee and served to deprive the deceased of rights granted by those provisions.

Prayer

46. Plaintiff respectfully requests that compensatory and punitive damages be awarded under the federal claims in the total amount of One Million Dollars ($1,000,000) for which the defendants are jointly and severally liable.

47. Plaintiff respectfully requests that compensatory and punitive damages be awarded under the pendent claim in the total amount of One Million Dollars ($1,000,000) for which the defendants Hymon, Hubbard and Wyeth are jointly and severally liable, and reasonable hospital, medical, funeral expenses and expenses of administration

necessitated by reason of injuries causing death to the deceased, Garner.

48. Plaintiff also requests that this Court grant declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202 declaring that the use of "Dum-Dum" type bullets by Memphis Police officers to apprehend persons fleeing from the alleged commission of non-violent felonies who pose no threat to the life or physical safety to officers or of third persons violates the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution and federal laws enacted pursuant to those Amendments.

49. Plaintiff respectfully requests that costs and counsel fees be awarded and that such other, further and additional relief as may appear to the Court to be just and equitable be granted.

(Signatures Omitted)

(Filed September 18, 1975)

(Caption Omitted)

ANSWER OF DEFENDANTS

COMES NOW the Defendants, Memphis Police Department, City of Memphis, Tennessee, Wyeth Chandler, Jay W. Hubbard, and E. R. Hymon and while reiterating and relying upon each and every ground set forth in their Motion to Dismiss, heretofore filed in this cause, for answer to the Complaint filed herein state as follows:

FIRST DEFENSE

1. Complaint fails to state a cause of action upon which relief can be granted.

SECOND DEFENSE

1. Defendants admit the averments set out in Paragraph 1 of the Complaint.

2. Defendants deny that this Court has jurisdiction as averred in Paragraph 2 of the Complaint.

3. Defendants deny that the shooting and killing of Edward Eugene Garner by a police officer of the City of Memphis also deprived the deceased of rights, privileges, and immunities secured him by the Constitution and laws of the State of Tennessee. Defendants deny that this action is a proper one for damages for wrongful death and survival and further deny that it is is a proper action for violations of the deceased's state-conferred rights through exercise of this Court's pendent jurisdiction.

4. Defendants are without information sufficient to form a belief as to the truth of the averment set out in Paragraph 4 of the Complaint with regard to Plaintiff Cleamtee Garner being an adult black citizen of the United States and the State of Tennessee residing in Memphis, Shelby County, Tennessee, and that he is the father and next of kin of Edward Eugene Garner, deceased minor, who died on October 3, 1974, and, therefore, deny same. Defendants deny that the death of Edward Eugene Garner was a result of Defendants' policies, practices, customs, and usages. Defendants are without information sufficient to form a belief as to the truth of the averment set out in Paragraph 4 to the effect that at the time of his death, Edward Eugene Garner, resided with Plaintiff and, therefore, deny same. Defendants admit that Edward Eugene Garner was fifteen (15) years old at the time of his death.

5. Defendants admit the averments set out in Sub-Sections (a), (b), and (e) of Paragraph 5 of the Complaint.

With regard to Sub-Section (c) of Paragraph 5 of the Complaint, Defendants admit that Wyeth Chandler is Mayor of the City of Memphis and as such is its chief executive officer and further admit that prior to becoming Mayor on January 1, 1972, Defendant Chandler was a member of the Memphis City Council, the City's legislative body. Defendants deny that Chandler is responsible for all policies and practices and actions or omissions of the Department and has the duty to preserve to all citizens the rights, privileges, and immunities secured by the Constitution and laws of the United States.

With regard to Sub-Section (d) of Paragraph 5 of the Complaint, Defendants deny that J. W. Hubbard is at this time Director of Police of Memphis. However, they admit that on October 3, 1974, he was Director of Police of Memphis, and in that capacity, as chief executive officer of the Memphis Police Department, he was responsible for establishing general practices, procedures, and policies with respect to the operation of that Department. Defendants further admit that pursuant to that authority he has promulgated regulations relating to the use of lethal force by Memphis officers and has authorized the use of weaponry and ammunition by police officers in certain instances. Defendants deny that any regulations promulgated by Defendant Hubbard in his official capacity or individually, directly or indirectly, violated the constitutional rights of the deceased.

6. Defendants admit the averments set out in Paragraph 6 of the Complaint.

7. Defendants admit the averments set out in Paragraph 7 of the Complaint, however, Defendants aver that not all revolvers are issued by the Department as some are privately owned.

8. Defendants admit the averments set out in Paragraph 8 of the Complaint.

9. Defendants admit that the Remington 125 grain jacketed hollow-point bullet is a member of a class of projectile sometimes referred to as "Dum-Dum" bullets. However, Defendants deny that it is commonly referred to by that name and aver that proper designation of such bullets is "controlled expansion projectiles." Defendants are without information to form a belief as to the truth of the averment that the bullets were named after an arsenal near Calcutta, India, and, therefore, deny same. Since the Complaint does not define the meaning of "traditional cartridges," Defendants are without information sufficient to form a belief as to the truth of the averment set out in Paragraph 9 of the Complaint with regard to the "Dum-Dum" bullets possessing the very special quality of expanding and flattening more easily in the human body than traditional cartridges, and therefore, deny same.

10. Defendants deny the averments set out in Paragraph 10 of the Complaint.

11. Defendants admit that the "Dum-Dum" type bullets have been outlawed in international warfare, but deny that it is because of the devastating effect it has upon the human body and aver that it has no more devastating effect on the human body than land mines, mortars, recoilless rifles, artillery, and atomic weapons which have not been outlawed.

12. Defendants admit the averment set out in Paragraph 12 of the Complaint.

13. Defendants admit the averments set out in Paragraph 13 of the Complaint.

14. Defendants deny the averments set out in Paragraph 14 with regard to the height and weight of the deceased Garner, however, they admit he did not respond to Defendant Hymon's order to halt and was shot with a Remington 125 grain jacketed hollow-point bullet from his service revolver. Defendants deny that the deceased was shot in the back of the head and aver that he was actually shot in the side of the head.

15. Defendants deny the averments set out in Paragraph 15 of the Complaint.

16. Defendants admit that the deceased Garner was unarmed at the time he was shot by Defendant Hymon.

17. Defendants deny the averments set out in Paragraph 17 of the Complaint.

18. Defendants deny the averments set out in Paragraph 18 of the Complaint.

19. Defendants deny the averments set out in Paragraph 19 of the Complaint.

20. The defendants deny the averments set out in Paragraph 20 of the Complaint.

21. Defendants are without information sufficient to form a belief as to the truth of the averment set out in Paragraph 21 of the Complaint and, therefore, deny same.

22. Defendants deny the averments set out in Paragraph 22 of the Complaint.

23. Defendants deny the averments set out in Paragraphs 24, 25, 26, 27, 28, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 42, 43, and 45 of the Complaint.

24. Defendants deny that they are liable for damages, either compensatory or punitive, under any Federal claims and further deny that Defendants Hymon, Hubbard, and Chandler are liable for damages, either compensatory or punitive, under the pendent claim.

25. Defendants deny that Plaintiff is entitled to declaratory relief pursuant to 28 U.S.C., Sections 2201 and 2202, declaring that the use of "Dum-Dum" type bullets by Memphis Police Officers to apprehend persons fleeing from the alleged commission of non-violent felonies who pose no threat to the life or physical safety to officers or third persons violates the 4th, 5th, 6th, 8th and 14th Amendments to the Constitution and the Federal laws enacted pursuant to those Amendments.

THIRD DEFENSE

1. For further answer to the Complaint, Defendants aver that on October 3, 1974, Defendant E. R. Hymon and his partner received a call to go to a residence at 737 Vollintine Street, Memphis, Tennessee, and they arrived upon the scene at approximately 11:00 P.M. where they were met by the occupant of 737 Vollintine, who advised them that the house next door at 739 Vollintine was being burglarized. Defendant Hymon ran back to his squad car, got his flashlight and advised his partner that someone was breaking in next door at 739 Vollintine. Defendant Hymon ran to the rear of the house and heard the rear door slam and a noise on the back fence. He shined his flashlight on the fence and spotted the deceased on the fence at that time. He then called out for the deceased to halt. The deceased continued to scale the fence, at which time Defendant Hymon fired one shot hitting the deceased in the side of the head.

2. Defendants aver that the actions of Defendant Hymon are governed by TCA 40-808, which reads as follows:

> "*Resistance to Officer* — If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest."

All allegations contained in the Complaint that are neither admitted nor denied are here and now denied as though specifically denied.

And now having fully answered, Defendants pray that this Complaint be dismissed and the costs be adjudged against the Plaintiff.

(Signatures and Certificate of Service Omitted)

(Filed March 3, 1980)

(Caption Omitted)

JUDGMENT

This action came on for (hearing) before the Court, Honorable HARRY W. WELLFORD, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered, on the remand from the Sixth Circuit,

It is Ordered and Adjudged that in accordance with the Order entered by the Court on March 3, 1980, judgment is hereby entered for defendants, including the City of Memphis and the Memphis Police Department in light of *Monell*.

Approved:

/s/ Harry W. Wellford
United States District Judge

Dated at Memphis, Tennessee, this 3rd day of March, 1980.

/s/ (Illegible)
Clerk of Court

(Filed July 8, 1981)

(Caption Omitted)

JUDGMENT

This action came on for consideration before the Court, Honorable Harry W. Wellford, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered.

It is Ordered and Adjudged that in accordance with the Order entered by the Court on July 8, 1981, judgment is rendered for the City of Memphis.

Approved:

/s/ Harry W. Wellford
United States District Judge

Dated at Memphis, Tennessee, this 8th day of July, 1981.

/s/ (Illegible)
Clerk of Court

TESTIMONY OF CLEAMTEE GARNER

• • •

• • • [8] first witness the Plaintiff in this case, Mr. Cleamtee Garner.

THE COURT: All right.

Whereupon,

CLEAMTEE GARNER,

after first being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DAYS:

Q. Mr. Garner, would you state your full name and address for the record, please? A. Stand or sit?

THE COURT: No, you may sit, Mr. Garner.

A. (By the witness) My name is Cleamtee Garner. You want my address?

Q. That is right. A. I live at 928 Tully, Memphis.

Q. And how long have you lived at that address? A. About 11 years.

Q. Are you the Plaintiff in this case, Mr. Garner? A. Sir?

Q. Are you the Plaintiff in this case? A. Plaintiff, Plaintiff, yes, sir.

[9] Q. Mr. Garner, could you indicate what your educational background is? A. About six grade level.

Q. And where are you originally from? A. Mississippi, Tillatoba, Mississippi.

Q. How long have you resided in Memphis? A. Since 1945.

Q. Since 1945? A. Since 1945.

Q. Are you employed? A. I am employed at the Memphis Defense Depot.

Q. And how long have you been employed there? A. About, since 1952, about 24 years.

Q. And what is your job category at the depot? A. W6 material packer.

Q. And have you been in that job since you started? A. I haven't been in that job since I started. I have been in that job about 12 years.

Q. I see. At what level did you start in that employment? A. I started out in laborers, W2 laborers.

Q. Is it correct to say that you moved up from that original level to your present position? A. Correct.

• • •

• • • [18] third degree burglary, you know.

That is when I went in and talked with one of the counselors, I believe, and they put him on probation for a year.

Q. You talked to a councilman or to a counselor? A. A counselor. I believe it was Mr. Rogers, if I'm not mistaken. I'm not sure.

Q. And you say as a result of these charges, your son was put on one year's probation? A. Probation, that is correct.

Q. As a result of these charges having been brought against your son and his being put on probation, did you take any action with respect to Eugene's behavior, Edward Eugene's behavior after that time? A. That is right. I counseled with him and I chastised him and gave him certain hours to be home, you know, during the day and at nighttime, and different things.

Q. What were the conditions of his probation, if you recall? A. What was the—

Q. (Interposing) Conditions of his probation. Were there any requirements that he had to meet to satisfy—

A. (Interposing) Restrictions. He had certain times of night he would have to be at home. Somebody would have to [19] know where he was at all times.

Q. And who in your family, if anyone, assumed the responsibility of overseeing that he complied with those requirements? A. I would, when I would be at home, and my wife was supposed to when I would be away from home. Of course, his other brothers and his older brother, he was concerned about him and they would keep check on him as near as they could.

Q. I believe you indicated that you were away from home? A. Yes, I worked the second shift, evening shift, and I'm supposed to be at work from four o'clock to 12:30 o'clock.

Q. And is that the regular shift you had? A. That is the regular shift I had.

Q. And you continue to work that shift? A. I still work that shift.

Q. So does that mean that you were away from your home from four o'clock in the afternoon until twelve o'clock midnight? A. I get off at twelve o'clock but I usually get home about one o'clock if I don't stop no place. Sometimes I stop at the store, at Fred Montesi's. But if I don't stop, I get home about one o'clock.

Q. Can you recall what, if any, problems Edward Eugene • • •

• • •

TESTIMONY OF TALTON DOUGLAS ENOCH

• • •

• • • [46] step down, Mr. Garner.

You may call your next witness.

MR. BAILEY: Your Honor, at this time we wish to call—may I peep in the jury room to see who is in there?

THE COURT: Yes, sir.

Whereupon,

TALTON DOUGLAS ENOCH,

having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BAILEY:

Q. State your full name to the Court, please. A. Talton Douglas Enoch.

Q. And Mr. Enoch, your occupation? A. Architect.

Q. With what firm? A. Gassner, Nathan and partners.

Q. And did I not engage you to go out to 739 Vollentine in order to view an alleged scene involved in the lawsuit in question? A. Yes, sir, you did.

Q. All right. While out there, did you happen to view the scene? A. Yes, sir, I did.

• • •

• • • [62] tell me what the distance— A. (Interposing) That is 37 feet six inches.

Q. 37 feet six inches. A. Right.

Q. When you were out there, Mr. Enoch—and I'll refer to it as a chicken wire fence running along the west side of the house—was it up or down when you

were there? A. Partially up and down. The area nearest the house was up and then the part nearest the chain link fence was down.

Q. All right. Do you know—of course, you wouldn't know what the condition of it was back in October 1974? A. I wouldn't have any idea.

Q. You wouldn't have any idea. And that chicken wire fence was how tall, did you say? A. Three feet.

MR. KLEIN: Three feet. That is all I have, Your Honor.

THE COURT: Anything further of Mr. Enoch?

MR. BAILEY: Just one other question, Your Honor.

[63] RE-DIRECT EXAMINATION

BY MR. BAILEY:

Q. Does Exhibit 2 show pretty much the condition of the fence when you were out there, the chicken wire fence? A. Yes, sir. That is what I would—it was up, you know, it was erect on the side nearest the residence and then falling down or sagging near the chain link fence.

MR. BAILEY: All right. That is all, Your Honor.

THE COURT: All right, sir. You may step down, sir. Thank you.

Gentlemen, why don't we take a brief recess now before you call your next witness and we'll be ready to proceed. About ten minutes.

(Recess.)

THE COURT: Are you ready with your next witness?

MR. BAILEY: Yes, sir. Mr. Enoch, would you resume the stand again, please?

There were three photographs, Your Honor, I neglected to get testimony on.

• • •

TESTIMONY OF LEEDELL ANDERSON

• • •

• • • [92] on to say that there was extensive cortical injury and superior saggital sinus transection. Do you know what that means? A. No, I really don't.

MR. KLEIN: I have no further questions.

MR. BAILEY: Your Honor, I might observe that we plan to call Dr. Francisco, who can define that terminology.

THE COURT: In any event, this record is admitted and Miss Stepp, after the next witness is called, the Clerk will have an opportunity to go with you to the Clerk's office and make a copy so that you can retain your record and the photostat will be introduced as the next exhibit number.

You may call your next witness.

MR. BAILEY: Mr. Anderson.

Whereupon,

LEEDELL ANDERSON,

after first being duly sworn, was examined and testified as follows:

[93] DIRECT EXAMINATION

BY MR. BAILEY:

Q. State your name to the Court, please. A. Leedell Anderson.

Q. Mr. Anderson, where do you reside? Where do you live? A. 739 Vollentine.

Q. And your age? A. Fifty-four.

Q. Married? A. Yes.

Q. All right. Is 739 Vollentine where you reside the site or the place where young Garner was shot by the police? A. Yes. Yes, sir.

Q. All right, and were you present at the—you weren't present at the actual shooting, were you? A. No, sir.

Q. You got home a little later after the shooting? A. Right.

Q. All right, and after you got there, did you get a chance to see the young boy who was shot? A. They was fixing to put him in the ambulance when I rolled up.

Q. I see. And your house had been burglarized, had it [94] not? A. Right.

Q. As a matter of fact, was there evidence that somebody had gained forceful entry into the home? A. Right.

Q. What kind of evidence was there? A. Well, the window was broken out and the door hadn't been broken in, so somebody had to go through the window to open the door.

Q. You say the door had been broken in? A. The door hadn't been broken in.

Q. Had not been broken in. A. The latch was still on it, but when I went in there it was open, so I assumed somebody opened the door from the inside.

Q. Was there no sign of any instruments used on the door? A. No.

Q. And the door was completely intact? A. Right.

Q. What about your window that you—which window are we talking about? A. The back window next to the bedroom was broken out.

Q. All right. I ask you to step down just a second, if • • •

• • •

[104] A. (Interposing) They didn't let her in when we first got to—

Q. (Interposing) They let your wife in when she first— A. (Interposing) No, sir. They didn't let her in when we first got there.

Q. All right. But she went in before you did, is that right? A. She was in about 40 minutes before I—

Q. (Interposing) All right. Was it you just didn't want to go in or they wouldn't let you in? A. They wouldn't let me.

Q. I see. But how long was it before they let your wife in the house? A. I imagine about 20 minutes, somewhere like that, before she—

Q. (Interposing) All right. What did you notice about the house when you went inside? A. All the stuff was out on the floors, all the drawers was pulled out, and stuff was scattered all over. That is all I remember.

Q. All right. Well, it was obvious somebody had been in there and ransacked the house, would that be what happened? A. What happened.

[105] Q. All right. How many rooms were upset, so to speak, or where there had been drawers out or something had been done to the house? A. One that I paid any attention to, and that was my wife's room.

Q. All right. No other room was disturbed as far as you remember? A. No, sir. The first I had some old coins in there and when they did let me in, I went to them. They were still there.

Q. The old coins were still there. Was there anything missing that you know of in the house? A. Well, my wife's rings was missing and she said she had a little old purse in there, a pocketbook or something or other. She had two five dollar bills in it.

Q. All right. Was that missing? A. Yes, sir.

Q. Anything else that you know of that is missing? A. Not that I know of.

Q. Did you later recover the ring or the purse with the two five dollar bills in it, or did your wife? A. They never did recover the ring. So they give her the ten dollars up here somewhere.

Q. I see. What about the purse that was—did she • • •

• • •

TESTIMONY OF ELTON RICHARD HYMON

• • •

• • • [129] counsel table if that is more convenient.

MR. DAYS: Fine. I am reading into the record portions of—my co-counsel has suggested that I take the witness stand.

THE COURT: All right, sir.

MR. BAILEY: Your Honor, while Mr. Days is reading, may I indulge or request the Court's indulgence to check on some other witnesses?

THE COURT: Yes, sir.

MR. DAYS: I am reading into the record from the deposition of Elton Richard Hymon, a Defendant in this cause, taken on the 26th day of April, 1976. I begin reading from the deposition at page four, lines six to nine:

Q. (Mr. Days Reading) Would you give your full name once again for the record, and your address? A. Elton Richard Hymon; at the time, 901 Woodland, Memphis, Tennessee.

(Mr. Days then reading from lines 15 to 24 on page 4:)

Q. Can you indicate to me your educational background, Mr. Hymon? A. Yes. Where would you like me to start?

• • •

[133] A. How fast, yes.

Q. How fast? A. Yes. In a given amount of time, yes.

Q. And what distance did you have to run, and if you recall, what minimum did people who wanted to be police officers have to make? A. I think the distance was roughly two miles or two and a half miles; I'm not sure. In something like 15 minutes, I believe.

Q. So, it was really endurance as opposed to speed, is that right? A. It was a combination of both. It wasn't a situation where you could run a few minutes, and walk, and make it in that length of time.

(Turning to page 30 of the deposition, beginning at line 22:)

Q. Were you given any instruction with respect to dealing with persons who are fleeing from what may have been the commission of a felony, who are unarmed, in terms of resort to lethal force?

(Turning to page 31:)

A. Would you run that by me again?

Q. I will restructure the question.

Were you ever, during training, presented with a [134] hypothetical situation where a person is fleeing from what appears to be the commission of a felony, but is unarmed, and the officer is aware of the fact that that person fleeing is unarmed, was such a hypothetical ever presented to you during training? A. I don't think so, but we were given some instances where we would—I think most of the instances where we use lethal force, it was up to our discretion period. They never said, "In this situation, you will use legal force." It was a discretionary situation. But some minor felonies, I guess, like larceny, you know, if it was just a minor larceny or something of this nature, then we were instructed that it wouldn't be a wise decision to use legal force.

(Turning to page 33 of the deposition, starting at line 19:)

MR. DAYS: Will you mark this for identification?

(Whereupon, said document "Agility test" was marked Exhibit 2 for identification to the deposition of the witness.)

Q. (By Mr. Days) Mr. Hymon, directing your attention to Exhibit 2 for identification, it's a three-page document. I want to ask you whether you can identify the nature of that • • •

• • •

[145] Q. Where is the fire house located? A. It's located at Stonewall and Chelsea.

Q. And upon arriving at 737 Vollentine would you described what you observed and what you did?

(Page 55:)

A. Yes. When we arrived, the—a lady was standing in the door at 737 Vollentine, and she was pointing towards 739 Vollentine, and she was, you know, just making a gesture with her finger, pointing in that direction. And I asked her what she was saying, and she made another gesture, make some type of gesture with her mouth, and I couldn't understand her, so I went up to the porch and asked her what she was saying. Roughly I recall her saying, "They are breaking in inside." And at this time I went back to the car and got my flashlight and informed my partner of what she said, and told him to go around to the other side.

Q. You used the term "They are breaking in." Did you understand her to be saying that there were several people inside the house? A. I don't really think she knew. I think that she—I think she might have mentioned that she had heard some glass breaking or something, and she knew that somebody was breaking in. I

don't think the plural form had any indication of her knowing.

[146] Q. But you recall her saying something about "They"? A. "They are breaking in inside."

Q. And after you notified your partner what you understood the woman on the porch to have said, did you or your partner make any effort to radio that information to the dispatcher, to other units in the area?

(Moving over to page 56:)

A. I didn't make any indication. I don't know what he did from the time that he moved the squad car over until the time he got around to the side of the house.

Q. Well, can you indicate what proper police procedure is, to the best of your knowledge, under such circumstances? Is it appropriate for you, once you've received information with respect to a crime being in progress, to radio that information to the dispatcher? A. Well, the first appropriate thing is to investigate to see that that's actually what's happening. Once we see that that is actually what's happening, we informed the dispatcher of our findings.

Q. I see. So, it's not incumbent upon you to communicate the information that you receive upon arriving on the scene to the dispatcher? A. No. He had already received that information.

Q. When you were talking to the woman on the porch, • • •

• • •

• • • [157] necessarily the best, but it would be one form of cover.

Q. Did you place your patrol car in a position where it might be resorted to for cover in case the person inside were armed? A. No, we did not.

Q. Did you consider doing that at all? A. No, we did not.

Q. Why didn't you? A. Well, because we had no indication that the person was armed. And for one thing, when I got to the rear of the house and I saw the subject running from the rear door, and I still had no indication that he was armed, and if I had then it wouldn't have been a position where we could get the car in and use it as a form of cover.

(Page 67:)

Q. Getting back to the woman on the porch, did that person indicate anything about the nature of the person in the house? Male? Female? A. No, she didn't.

Q. Did she indicate whether she had seen the person inside the house? A. No, she didn't.

Q. Was there only one person on the porch at that time? A. Yes. That's all I ever did see.

• • •

• • • [170] approximate distance between the back of the house to the chain link fence? A. No, I don't.

Q. Do you recall whether the fence was new or old? A. It really didn't look brand new, but it didn't look, you know, rusty.

Q. Would you say the fence was in good condition? A. Roughly, I would.

Q. Did the fence run down to the ground, or was there any space underneath the fence? A. As far as I can remember, it ran all the way to the ground.

Q. Now, you indicated that you saw some weeds beyond that fence, is that right? A. Yes.

Q. Can you describe those weeds? A. As far as I can remember, I believe it was Johnson grass or regular grass, just tall grass.

Q. How tall would you say the grass was? A. Well, I would think that it came up just roughly—I think that it came up to almost the height of the fence.

Q. It was almost six feet high? A. It was rather high. I am not sure that the fence was six foot, but I'd say almost, or maybe half the height of [171] the fence, but it was tall.

Q. Could you see beyond the weeds? A. No, because it was a dark area.

Q. Well, could you see how deep the grass was with your flashlight? A. I wasn't really paying any attention to it, as much as I was the subject.

Q. Well, is it fair to say that based upon what you were able to see, the grass could have been tall one foot beyond the fence and not tall after that? A. It could have been tall one foot beyond the fence?

Q. Yes. A. No, I wouldn't think so. From watching him in the grass, and I watched him in the area around, I just don't recall exactly how it was, but to the best of my ability, I was recalling that he was over the fence, then he was gone because the grass was—to me it was that tall.

Q. What, if anything else, did you observe about the back of the house? You described the fence, the grass, the building. Were there any clotheslines in the back yard, to your knowledge? A. I guess roughly it was. I think I remember seeing a clothesline.

Q. You also described seeing a garbage can. Can you • • •

• • •

[177] A. I saw—I couldn't plainly see him, but I saw, you know, I knew it was an individual; and again, I knew it was a black male.

Q. Was this person's face turned toward you at any point? A. I believe he looked in my direction, yes.

Q. Do you recall the position of his feet at the time that you shined the light? A. No, I do not.

Q. Do you recall the position of his hands at the time you shined your light? A. Yes. I believe his hands were grasping the fence, and I believe he was in a stooped position.

Q. And after you cried "halt" did you keep your flashlight on this individual? A. Yes, I did.

Q. And what happened after that? A. My partner, sometime before that, had made it to the edge of—to the corner of the house, the southeast corner of the house, and the individual stopped and I told him—my partner, that he was around behind the building, you know, on the fence. And told him to come around and get him.

Q. All right. Now, your partner had arrived at the southeast corner of the house, is that right?

• • •

• • • [185] fence; and before I could have made a step to get over the fence, he would have been already over the fence. I mean, it was just that quick.

Q. Did you at any point instruct your partner to try to circle around the other side of the fence, if possible, to head him off? A. It happened too fast.

Q. You didn't think about that? A. Well, I would have thought about it, you know, had it been a slow process. But like I said, when I told my partner and he started in that direction, then the individual was already up at the top of the fence. And as far as I can recall, there was no way that he could have gone around and circled.

Q. Did you indicate anything to your partner about whether this individual was armed? A. I don't recall us discussing that. I'm sure that the—excuse me. I'm reasonably sure that the individual was not armed, because had he been armed, I assume that he would have attempted to show that by firing a weapon, or I assume

that he would have thrown it down, or I assume that I would have seen it.

Q. Well, if you had had any questions about whether this person was armed, would it have been your responsibility [186] to notify your partner of that fact? A. Definitely.

Q. And what would have been the normal way you would have gone about notifying your partner of that fact? A. Well, I would have—the thing I would have said, I guess, is that "He has a weapon" or "He has a gun" and I would have taken more cover than what I had.

Q. Did you have a riot gun in your car that evening? A. Yes, I sure did.

Q. During the course of this deposition I have been using the term "individual" and so have you. Is this individual we've been discussing Edward Eugene Garner? A. Yes.

Q. You later determined that this person was Edward Eugene Garner? A. Right.

Q. Did you tell your partner to shoot Edward Garner at the time you told him where he was located, that is, where Garner was located? A. No.

Q. Tell me again what you recall saying to your partner. A. I recall telling him that he was on he fence, on the side of the house, or in back of the house.

• • •

• • • [188] that time. It wasn't exactly toward me; his whole body was at an angle.

Q. His whole body was at an angle, meaning exactly what? Could you see part of his face at the time that he was climbing over? A. Just the side.

Q. You could see the side of his face? A. Yes.

Q. Could you see part of his chest? A. No. His chest would have been in front.

Q. Could you see his hands at all times? A. I'm reasonably sure I could.

Q. Did you aim your gun at that point? A. No. It was a point shoulder position. It was not aimed—I knew that I had the revolver on him, but it wasn't aimed at any certain portion other than the widest portion of the body.

Q. Under those circumstances were you following the correct procedure in firing your gun? Let me clarify it a little bit more.

Was the way in which you fired the gun according to proper police procedure, the stance that you took, the way you pointed your gun, and the way you fired it? A. I couldn't elaborate on the stance because I don't • • •

• • •

[190] A. No.

Q. After you fired, what took place? A. After I fired, my partner came around where the individual was going across the fence, and said that he was bleeding badly from what seemed like the head, I think he said. He was slumped over the fence.

Q. Your partner yelled this information to you, or stated this information to you? A. He stated it to me.

Q. And then what did you do? A. I proceeded over to Garner. We got him off the fence, and I advised my partner to call for the lieutenant and ambulance and Crime Scene—

Q. (Interposing) How did you proceed over to the fence? A. By stepping across the—what appeared to be the chicken wire fence.

Q. So, you stepped over the fence, that is, the chicken wire fence? A. Yes.

Q. And went to the chain link fence where Garner's body was draped? A. Right.

Q. And did you remove his body from the fence? [191] A. Yes.

Q. Did you do that by yourself? A. I don't recall. Seemingly, we both removed it from the fence.

Q. Let me backtrack just briefly for a moment.

At the time you saw Garner at the fence, can you indicate what the relationship of his body was to the fence, how much fence was above his head at the point he was standing at the fence? Was there any fence remaining above his head? A. I would think that in the stooped position, he was probably about halfway the height of the fence.

Q. So, he was somewhat stooped at the time? A. Right; in a jumping position.

Q. I see.

You are speaking of before the shot was fired? A. That's right.

(Turning to page 107 of the deposition:)

Q. At the time that this incident occurred on October 3rd, who was in charge? Were you in charge, or was your partner in charge? By "in charge" I mean who had the superior rank? A. I did.

Q. So, you were in charge, is that right? A. Right.

[192] Q. When you first perceived a figure moving from the back of the house to the fence, what was your impression of the size of that person? A. In relation to what? Height? Weight?

Q. Height and weight. A. Well, I really didn't have an opportunity to get a vivid impression. He looked —looked like an adult, I mean, by—you know, by face, by the look, well, I couldn't tell really from the door to the fence, but once I shined the light on the fence, as far as I could see, considering the lighting factor, he looked to be about seventeen or eighteen years old.

Q. Well, what sense did you get of his size when he was at the fence and you could see his face? A. He wasn't short, you know, which would indicate that he wasn't necessarily that young, and he wasn't real tall. I would say he was in the neighborhood of five-five or five-seven, and I would say maybe a little larger weight, a hundred and maybe thirty pounds, just roughly.

Q. Do you recall whether Garner was wearing a coat that evening? A. I don't think he was. I'm not sure.

Q. Would it be fair to say that what you saw, his physical appearance, would not have been distorted by any [193] additional clothing or unnecessary clothing? A. That's not necessarily so. I don't remember what he had on.

Q. I see. You testified, did you not, that when Garner reached the fence he paused for a moment before going up on the fence? A. Right.

Q. Could you give any quantification to that period during which he paused? How many seconds? How many minutes did he pause? A. Well, roughly, using my judgment, I would say that as I appeared and shined the light on him and said "police; halt" there was a moment of, you know, stopping and looking, maybe to see that I was who I said I was, since I had some light from the house next door. And then, at the same time, after I finished saying that, I had noticed that he stopped a few minutes, and I was telling my partner to go around and get him because he had stopped, you know, that's when, after the second time—

Q. (Interposing) You said you saw him pause there for a few minutes. Do you mean to say that he was in a paused position for a period of time that could be measured in minutes? A. Well, I would say, I guess I could say that, yes, • • •

• • •

• • • [574] attempt to simulate anything but as conditions allegedly or purportedly were, but we simply have that opportunity with counsel present at the place after dark, but since neither side is pressing us on that point, we will make no present plans to do so until or unless we hear further from counsel to do that. All right. You may proceed.

MR. KLEIN: Your Honor, in view of the Court's ruling and as the Court has indicated, not ruling at this time on the training procedures, the policies of the police department with regard to the use of lethal and non-lethal force, and the policy of the police department wherein they decided to use the hollow point bullet, I would like to call one witness out of turn. Ordinarily I would call Officer Hymon first, but I have General Hubbard here.

THE COURT: All right. I want to make one other thing clear. The Court, you are correct that the court is not • • •

• • •

[613] Q. Did you own the revolver or was that issued by the police department? A. That was police issue.

Q. The ammunition that you were issued, was that also police issued? A. That was police issue.

Q. Who was your partner on October 3, 1974? A. Patrolman L.B. Wright.

Q. All right. And what was your duty hours on October 3, '74? A. We were working from 4:00 to 12:00.

Q. Was that 4:00 in the afternoon to 12:00 midnight? A. Yes, it is.

Q. And I take it that you came on duty at 4:00 that day? A. Yes, sir.

Q. And your particular duties were what at that time? A. My particular duties were to run ward 128.

Q. All right. Would you do that in a squad car? A. Yes, we were just generally patrolling the area, routine patrol.

Q. Do you recall getting a call with regard to [614] an incident at 730 or 737 I believe, Vollentine that particular evening? A. Yes, I do.

Q. Tell me how you first found out about it? A. I was, first of all I was in the firehouse, I believe at Chelsea and Stonewall, and my partner came in and told me that we had received a call of a prowler inside 737 Vollentine, and we proceeded from there to that location.

Q. All right. What did that indicate, you say prowler, did the report indicate that there was a prowler inside a house, is that the report that you got? A. We really didn't know whether it was a residence or business, but it did indicate prowler inside.

Q. And the given address? A. 737 Vollentine. I didn't receive the call. My partner may have been told that it was a residence.

Q. Did he come and get you? A. Right.

Q. And what did you do next? A. We left that area and proceeded in the direction of the call.

[615] Q. All right. Do you know approximately how long it took you to get from where you were at the fire station to the residence? A. Well, it took us a little longer than usual. I think it was, may have been about eight or nine minutes because we got lost on the way going to the call.

Q. I see. Was that because you weren't familiar with the area? A. Right, you know, we thought the street was one place and the street ended and we thought that it was the, we thought it was a bad number, so to speak, and we later discovered that it extended on the north side of Chelsea.

Q. Who was driving? A. My partner, Leslie Wright.

Q. All right. And then tell me what happened, when you arrived at the, I take it that you went to 737 Vollentine? A. Yes, we did.

Q. All right. Tell me what happened then? A. When we arrived on the scene, if I recall correctly, we were going east down Vollentine to approach 737 and we arrived on the scene and there was a lady standing out on the porch and pointing in [616] an eastwardly direction to the house next door, and she was mumbling something, but we could not hear what she was saying, so we were still in the car, both of us sitting in the car, so he asked her out loud, "What did you say?" She just mumbled and made a motion toward the house next door.

Q. What would the house next door be? A. 739. And since I couldn't understand her, then I got out of the squad car and went up to the porch where she was and she pointed again and said, "Their breaking in next door."

Q. Now, what did she say? A. She said, "They are breaking in next door."

Q. That is her words as best you recall? A. Yes, it is.

Q. All right. And then what did you do? What did your partner—was he still in the police car? A. Yes, he was still in the police car.

Q. All right. What did you do then? A. I went back to the squad car, told him what she had told me, that they were breaking in next door, they were breaking in, however she put it, I got my flashlight out of the car and proceeded [617] to the southwest corner of the house.

Q. All right. Did you give any instructions to your partner at that time? A. I think I roughly recall telling him to go around to the other side.

Q. All right. Let me ask you this about instructions. Is either one of you or were either one of you, so to speak, in charge at that time? In other words, were you

superior to Officer Wright or is he superior to you? What I'm getting at, were either one of you in command of the situation at that time? A. Generally the senior man was in command and I was the senior man at that time.

Q. So you told Officer Wright to go around to the other side of the house? A. Right.

Q. All right. Then tell me exactly what you did step by step? A. After I told him that I proceeded toward the southwest corner. I had my flashlight in my hand. And sometime between the time that I got there it was a rapid procedure, so I assume I immediately started drawing my service revolver and I got to the southwest corner of the house, and [618] when I got to the corner and looked around, then I heard the door, screen door open and slam and I saw a figure run across a streak of light that was there toward the south of that location. After I had seen that I shined, I started my flashlight shining where I had seen him from the beginning in a circular motion to try and find him, and I picked up a young male on the fence or what appeared to be a young male on the fence.

Q. All right. When you say a streak of light, what was the lighting situation out that at that time? A. The lighting was very poor. I recall the lady who gave us the directions from the beginning telling us that they were breaking in next door, somehow or another flicking on the porch light. I absorbed most of that, the light, because most of that light was to the side of me, it was just a ray of light going across the rear door. However, the back portion fenced in area on back was dark, I couldn't see anything.

Q. When you say fenced area, there has been some reference to a chain link fence that ran across the back property line. A. Right, the chain link fence.

[619] Q. All right. Could you see beyond the chain link fence? A. No, I could not.

Q. Did you have any idea at that time what was beyond the chain link fence? A. No, I did not.

Q. All right. You say that you finally picked up this male on the, in the back by the fence, is that what you— A. Yes.

Q. All right. What part of the yard was he in when you first picked him up? A. He was in the southeast corner of the yard over there an outer house.

Q. All right. If I may, let me refer to this exhibit that is marked Exhibit 6.

THE COURT: Counsel may approach.

MR. DAYS: Thank you, Your Honor.

Q. (By Mr. Klein) If you would take this pointer, Officer Hymon, let me ask you this, does this simulate the location at 739 Vollentine? A. I would think that is a reasonable facsimile.

Q. Now, show us now which side of the house that you came around when you left your car, when [620] you say that you proceeded around the side of the house? A. O.K. I came around at an angle to about here.

Q. All right. Now, that is the, what corner of the house? A. The southwest corner.

Q. All right. Was there a fence in front of you, immediately in front of you? A. Right, there was a fence about in the area here than ran from the corner of the house to the chain link fence in the rear.

Q. All right. And how high would you say that fence was? A. I would say it was from three and a half to four feet high.

Q. All right. Now, show me where you said the someone ran out of the back of the house? I think you said that you heard a screen door slam first—where were you approximately, if you remember, when you heard the screen door slam? A. I was about in the area just adjacent to this where I could see, you know, in a straight line almost in a straight line down in that direction.

Q. You are pointing just about to the corner [621] of the house? A. Right.

Q. All right. Now, show me where you said that the person running out of the back door went to the chain link fence and was by the fence when you put your spotlight or flashlight on him, is that what you said? A. Right.

Q. Where at the fence was he when you put your flashlight on him? A. I was about in the area because he ran at an angle here, and he got in the area somewhat close to the outer house and close to the corner of the outer house near the fence.

Q. You would be talking about the southwest corner? A. Right.

Q. Of the outer house? A. Right.

Q. All right. What did you do—well, let me ask you this, did you say anything at any point? A. Yes, after I had picked him up with my flashlight I immediately yelled, "police, halt." And after I had yelled, "Police, halt," I went to call to my partner, you know, a matter of seconds, I went [622] to holler to my partner, "He's on the fence." And my partner said, "What, he's on the fence?" And by that time when I told him that I made a couple of steps this way in the direction and just as I did that he started over the fence.

Q. When you say you made a couple of steps, now, which direction are you—show me where you were when you started to make ...? A. I was here and I made a couple of steps in the direction toward the fence.

Q. Why were you making steps toward the fence? A. I was under, initially under the impression that once I identified and he stopped momentarily and looked at me, that he was going to stay there. I didn't want to necessarily gamble on my partner getting along, I made a couple of steps in his direction hoping in the future to go over the fence and we were both going to apprehend him.

Q. And then you say, well, tell me then what did he start to do as you made your couple of steps toward the, I will call it the chicken wire fence? A. About the time that I made one foot in front of the other, made the step up toward the fence and [623] got even with the fence he started over the fence in a leaping, I guess, real leaping motion.

Q. All right. Then what did you do next? A. That is when I fired one shot and he fell and draped across the fence.

Q. All right. Let me ask you this question. Why did you fire a shot at that time? A. Well, first of all it was apparent to me from the little bit that I knew about the area at the time that he was going to get away because, number 1, I couldn't get to him. My partner then couldn't find where he was because, you know, he was late coming around. He didn't know where I was talking about. I couldn't get to him because of the fence here, I couldn't have jumped this fence and come up, consequently jumped this fence and caught him before he got away because he was already up on the fence, just one leap and he was already over the fence, and so there is no way that I could have caught him.

Q. Now, was this all happening rather quickly. A. It was happening very quickly.

Q. All right. Now, after you fired your shot, what did you do? A. After I fired the shot I recall my partner [624] going to the fence area and saying that he was hit very bad, and I was stepping over the fence and coming in that direction.

Q. You say "stepping over the fence" you are talking about the chicken wire fence? A. Right, the chicken wire fence.

Q. Did you have any difficulty getting over the chicken wire fence? A. No, I didn't have any difficulty.

The fence was the size that I, you know, could step over it.

Q. Well did you know at or immediately before you shot what was immediately on the other side of the chicken wire fence, and did you know what was in the yard or anything about the terrain in the yard between you and where he was on the fence? A. I didn't know what was immediately what was on the other side of the fence. I do recall seeing some other articles in the yard that would have been close to me, clothesline, clothes and tub and what have you, which would have closed me down to perhaps assure me of having not got, caught him, having to push these articles out of the way, and I surely wouldn't have found him in the dark.

Q. Let me ask you this question, was there any [625] question in your mind that you could not apprehend him on foot? A. Definitely so. Perhaps if the area behind him had been light and I would have known the general area I would have, you know, I would have if I could have seen where he went at a later time, what I'm saying from where I was I couldn't have gotten to him and have got him without him getting away. If there had been a big floodlight where I could see—

Q. The fact that you didn't know what was on the other side of the chainlink fence, did that influence you in any way at all about your decision? A. Definitely so.

Q. All right. Did you have any concern about being able to get over the chainlink fence? A. Definitely so, because I could have easily stepped over the chicken wire fence, but, you know, I had my flashlight in one hand and my pistol in the other hand and then we got the handcuffs and what have you on, which is not exactly light, and I would have had to somehow run and hold onto my flashlight and hold onto my pistol and somehow

spring up and get on across the six and/or six and a half foot. No doubt I would have fallen with all of that [626] in my hand, and then after that I would have to try and find out where I was.

Q. How tall are you? A. I'm 6-4.

Q. Did you think that you would have any difficulty, aside from the fact that you had a flashlight in your hand and a pistol in your hand, did you anticipate any difficulty in getting over the chainlink fence, just climbing it without any handicap, such as a flashlight or pistol? A. I think it would have been some kind of problem. It is not exactly easy for a 6-4 man to go over a six foot fence that way. It would have taken some effort.

Q. What kind of footwear did you have on? A. We had on what they call jumper boots, they are somewhat heavy boots.

Q. Would there be any way that you can put your foot anyplace in a chain link fence where you can put your foot to help you get over the fence? A. No, it would have had to have been strength, flipped myself over the fence and then get up and tried to go from there. There is no way to put anything, you know, as far as a stirrup to put your foot in.

[627] Q. Did you have any concern about the subject being able to outrun you? A. Yes, I did, because I have always got that concern, as a matter of fact, well, because of the fact he was young and no doubt the fact that he has a little more energy, and with me having to run with all of the equipment that I had I don't think I could have caught him.

Q. Let me ask you this, did you know what was in the house at that time? A. No, I had no idea. The only thing that I observed, I saw the garbage can under the window and the window broken, which indicated to me after the subject came out the door that he had been

inside, that something was wrong inside, whether there were people in the house or what exactly had gone on inside.

Q. Do you know whether or not he had an accomplice? A. I had no idea because I assume that he did because the lady said when she told us the directions that it was, "They were breaking inside," which indicated there might have been more than one.

Q. Did that present a problem for you as far as going over the chicken wire fence and going across the back yard in the same path where he had [628] exited from the back door? A. Well, it certainly did because, first of all my partner didn't exactly—I think he had gotten to the corner of the house somewhat at the last minute or so, but he didn't exactly know what was going on and I would have had to have watched the subject that was on the fence, see if my partner was there and then watch the side at the same time to see if there was somebody else in the house who might have had a weapon or whatever. Basically somebody in the house who might come out later on, so I think I had my hands full really.

Q. In other words, what you say, you would have left your backside exposed to somebody coming out of the house? A. Right.

Q. Or somebody in the house who might have had a weapon to shoot out—

MR. DAYS: I move to strike the recharacterization of the witness's answer.

THE COURT: I sustain the objection to the recharacterization of a witness's response. Mr. Klein, as you know we can only take the proof and evidence from the [629] witness, and counsel's recharacterizing it is improper.

Q. (By Mr. Klein) All right. After you got to the subject, I think your partner got to the subject first, is that correct? A. Right.

Q. All right. What did you observe about the subject? A. Well, first of all where he was on the fence. He was hanging across the fence about, right about in this general area hanging across the fence with his arms and chest area hanging across the fence and his feet hanging back on this side of the fence.

Q. All right. Let me go back now to the time where you first saw him. Did you know positively whether or not he was armed? A. I really had no idea as to whether he was armed or not. I could only see one of his hands, and I wasn't really—I wasn't really concentrating on it as such. I assumed he wasn't—I figured, well, if he is armed I'm standing out in the light and all of the light is on me, the I assume he would have made some kind of attempt to defend himself, but I had no idea what was in the hand or what he [630] might have had on his person.

Q. Then after he was taken—who took him off the fence? A. My partner and I.

Q. And then what did you all do next? A. We laid him down in the area and we saw—we had seen where the wound was. We laid him down and I think we took a handkerchief and tried to stop the blood. He had blood spewing from his head and we tried to exert direct pressure on the wound to stop the blood from running and then we called the ambulance, for an ambulance.

Q. How long did it take the ambulance to arrive on the scene? A. It took the ambulance something like three minutes, if that long, they were very rapid.

Q. And what happened after that as far as the subject was concerned? A. He was—

Q. Was he taken away? A. He was taken to one of the hospitals. I believe it was John Gaston Hospital.

Q. Did you remain on the scene? A. Yes, I did.

Q. All right. And what happened after that as • • •

• • •

[633] Q. Was any action taken against you as a result of this shooting? A. Yes, I was relieved of duty with pay, as is customary, you know, in any type of action such as this, they relieve you of duty with pay pending the investigation. I think that was, to the best of my knowledge, that was about Friday. I was relieved of duty that Friday morning and I think I was back to work that Monday.

Q. All right. Was any disciplinary action taken against you as a result of this shooting? A. No, it wasn't. I had to go before the Firearm Review Board. We have a Firearms Review Board that reviews whenever an officer has to fire his weapon. I had to go before the Firearms Review Board and tell them basically the same thing that had happened out on the scene, and no action was taken. They found that I was justified according to policy.

Q. You know whether the matter was presented to the Shelby County Grand Jury? A. Yes, it was presented to the Grand Jury on a charge of murder and no true bill was returned.

Q. All right. Do you know who testified before the Shelby County Grand Jury?

• • •

• • • [644] that you stepped over the fence, that is the chicken wire fence and you went over to where the body was located, is that right? A. Right.

Q. Do you have any estimation of how long it took you to move from where you were on the west side of

the chicken fence over to the east side and to the cyclone fence? A. No, I don't. I imagine it was rather rapid because after the shot I really wasn't expecting necessarily to hit him. Because of it, after my partner told me he had been hit and bleeding badly from the head, I might have got stunned and stood there for just a minute, I don't know if I rushed immediately over there.

Q. Once you started moving from the west side of the house over to the east and to the cyclone fence, how long do you think it took you? A. Well, it didn't take me that long. I almost got my neck hung on the clothesline wire. It didn't take me very long, just a matter of ducking and moving around.

Q. All right. And I believe you testified that at the time that you got to the back of the house you didn't have any knowledge of whether there [645] was one person or several persons in the house, is that right? A. Well, from the indication, what the lady gave, I assumed that it was more than one because she said, "they", and "they" means plural.

Q. Well, what are you taught, Mr. Hymon, in terms of proper police procedure if you think there is more than one person running from a house where a burglary has been committed and one person runs out to a house and you, as an officer, are exposed to the back of the house and don't know whether another person is going to rush out of the house, or is it, is the procedure one of shooting at the first person who is trying to go out of the yard or not shooting at the first person or waiting until the second person exits before taking any action? What generally is the proper procedure, if you know? A. Well, the procedure for me would be if I thought there was more than one, to approach the one who I did see in a way where I could also, so if possible, see the openings of the house. In other words, I approach him cautiously.

Q. In other words, you would, if I understand you correctly, make certain that you would not be in a position where you might be shot by someone running [646] out of the house who happened to be armed? A. Or for him that, or him for that matter.

Q. Or the person that was climbing over the fence? A. Right.

Q. Well, did you do that, did you feel that under the circumstances that you were in a position whereby you wouldn't open yourself up to this type of possible injury by a second person, coming out of the house? A. Well, ideally I say that is what I would do, but when you get in that moment of situation, I recall perhaps not, you know, jumping and running over to him as I knew he wasn't armed because I really didn't know. I recall being a little cautious, I don't know if I just lingered and stood around waiting for somebody else to come out of the house. I don't recall doing that at all.

Q. I believe on direct you also testified you really didn't know whether Garner was armed, isn't that right? Isn't that what you testified? A. True.

Q. Let me direct your attention again to a document that I showed you earlier and ask you whether in the course of this examination you were asked anything • • •

• • •

TESTIMONY OF EUGENE L. BARKSDALE

• • •

[303] EUGENE L. BARKSDALE,

having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DAYS:

Q. Would you state your full name for the record, please. A. Eugene L. Barksdale.

Q. And do you reside in Memphis? A. Yes, sir, I do.

Q. Are you presently employed? A. I am on a leave of absence from the Memphis Police Department.

Q. And prior to your taking leave of absence, what capacity did you have at the Memphis Police Department? A. I'm an inspector. At the time that I took my leave of absence I was inspector of the personal crimes bureau.

Q. Can you give some indication of the nature of your responsibilities as a commander of that division? A. Right, I had the administrative duty and responsibility and command responsibility of all detectives assigned to homicide, assault, sex crimes, • • •

• • •

• • • [317] if his partner was not there, I think, if I'm making myself clear, because you work on a partnership concept.

Q. Mr. Barksdale, how certain do you think an officer should be that he could not apprehend a fleeing unarmed felon using non-lethal means before he resorts to lethal means? A. There again, you know, that is a matter of a personal opinion as to what he is thinking at that particular time because he is under a lot of stress and that

adrenalin is running and you are straining to do everything possible to apprehend an individual without resorting to violence, but it is an individual decision to make that particular time based on the training and the job knowledge that you possess, and that is where the individual thought comes in.

Q. Well, should an officer be fairly certain that he can capture the fleeing felon or reasonably certain or merely absolutely certain, what standard? A. If he is sure that he couldn't apprehend that subject, and it is a fleeing felon, then under the state law then that is his job. Now, if he is sure that he could apprehend and knows beyond a reasonable doubt that the individual is not armed, [318] then I think he should use whatever means at his disposal to apprehend without the shooting.

Q. What about something in between where the officer knows the felon is unarmed and is not certain that he can catch him but thinks that the likelihood is that he cannot catch him? A. I think he should make the effort to apprehend him without firing a shot.

MR. DAYS: We have no further questions.

THE COURT: O.K. You may examine.

MR. KLEIN: I would like to examine with the same understanding that I examined Mr. Jones.

THE COURT: You are examining without waiving your objection.

CROSS EXAMINATION

BY MR. KLEIN:

Q. Sir, you said you were on a leave of absence? A. Yes, sir.

Q. I think it is because you are involved in a political campaign at this time? A. Yes, sir, I am, yes, sir.

Q. I don't mean to be prying. I assume that • • •

• • •

TESTIMONY OF JOHN A. COLETTA

• • •

[132] JOHN A. COLETTA,

resumed the stand and testified further as follows:

DIRECT EXAMINATION

BY MR. DAYS:

Q. Mr. Coletta, yesterday when we recessed I believe we were discussing a concept called relative incapacitation index, and you expressed a familiarity with that particular phraseology and index. Could you again for the record, indicate wh[illegible] you understand that index to reflect? A. Yes, sir. Well, the index reflects the ranking or order of various projectiles according to this particular study by the law enforcement standards program that attempts to rate various type of ammunition. However, I must say again this morning that any study is subject to criticism, is subject to be tested for its validity. That the table in and of itself is nothing but a group of numbers, that it must be explained that it must be discussed, the premise is brought forth for that to have any value or significance whatsoever and then the significance of the validity of the study can then again be questioned.

Q. Is this the document to which you have been • • •

• • •

• • • [204] the characterization of the assumption. I'm overruling that the witness is explaining his answer and part of what the testimony will be, whether the answer will be based upon the assumed question has been made or not, so I'm overruling your objection. You may proceed.

Q. (By Mr. Klein) Go ahead. A. The officer is physically barred from the area by a fence so that he can't get to him. The officer has shouted to his partner for help, and evidently that help did not arrive. The officer saw that the subject was attempting to scale or vault the fence and that in the event that he should succeed then probably he would escape and feel like that if he could see, that in the light, which in a city you stated it was dark, but I know that in a city that light is reflected and that certainly if he could observe, that he could observe the fact that the man was scaling the fence and attempting to escape, and that in my opinion, should he have been successful in scaling the fence, I don't think that the officer would ever have caught him, so I think he was justified for those reasons.

• • •

TESTIMONY OF DR. J. T. FRANCISCO

• • •

[223] DR. J. T. FRANCISCO,

having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DAYS:

Q. Doctor, were you subpoenaed to appear in court today? A. Yes.

Q. Would you give, for the record, your full name and address. A. Jerry Thomas Francisco, Memphis, Tennessee.

Q. And would you indicate your present employment? A. Professor of pathology, State of Tennessee,

state medical examiner, state of Tennessee, County medical examiner of Shelby County.

Q. Dr. Francisco, would you indicate something about your training and background for your present position? A. I received my premedical education at the Lambuth College and the University of Tennessee at Knoxville, M.D. degree from the University of Tennessee here at Memphis, one year of rotating internship at the City of Memphis Hospital, four years of pathology training at the Institute of • • •

• • •

• • • [229] of a deceased by the name of Edward Eugene Garner? A. Yes.

Q. And can you indicate the circumstances surrounding your performance of that particular autopsy, that is, how was it that an autopsy was performed by you of this particular deceased? A. Well, the death was reported to the office of the county medical examiner relating a death that fell into the categories that are reported, I believe. The body was delivered to the laboratories of the medical examiner and at that time a post mortum examination was conducted at that time.

Q. Based upon the autopsy that you performed, were you able to determine anything about the height and weight of the deceased Edward Garner? A. Yes.

Q. And what did your autopsy reveal? A. Height 64 inches, weight 60 pounds.

Q. Excuse me. A. 60.

Q. Broken down into height in terms of feet, how many feet would that be? A. Five feet four inches.

Q. And you indicated the weight to be 60 [230] pounds? A. Yes.

Q. Now, Doctor, there has been testimony in the record of the deceased Edward Garner's weight being anywhere from 85 pounds to a hundred and thirty pounds.

Are you convinced that the result that is reflected on that—reflected as a result of your autopsy weight is an accurate one? A. No.

Q. Why do you say that? A. Well, the weight of sixty pounds probably represents a light weighing of the body. The body, at least based on the photographs, the weight of the organs and other factors is probably heavier than sixty pounds.

Q. Would you be able to suggest an outside limit in terms of the weight of this particular body? A. The weight would be less than a hundred.

Q. Were you able to determine anything about the overall body structure of this deceased as a result of the autopsy? A. Yes.

Q. And what did you conclude? A. This was a thin individual.

Q. Is it part of your responsibility in conducting • • •

• • •

• • • [235] functioning of the individual? A. Within certain parameters, yes.

Q. Within those parameters what would you be able to conclude? A. Well, that this level of alcohol would probably affect reaction time.

Q. Dr. Francisco, I would like to direct your attention to the area of wound ballistics.

MR. DAYS: And, if Your Honor please, I think it would be helpful to have a board on which Dr. Francisco could write.

THE COURT: Yes, sir. You may approach if that would be easy and counsel and adversary may approach if that would be of assistance and you may proceed, Mr. Days.

Q. (By Mr. Days) Dr. Francisco, you indicated that you have a specialty in the area of wound ballistics. Can

you indicate generally the process by which one is, as an expert in this field, would go about predicting the wounding capacity of certain types of projectiles? A. Well; the features that are most significant in producing the wounds, a formula in which the * * *

* * *

[262] Q. Did you perform the autopsy yourself? A. Yes.

Q. Did anyone assist you? A. Yes.

Q. Who assisted you? A. Dr. James Bell and Dr. Joseph Zapalio.

Q. So there were three of you who were actually performing the autopsy? A. That's correct.

Q. You were commenting on the alcohol content earlier and did I understand you to indicate that that was probably, or that was more than the normal alcohol content that you would, than you would expect in a normal person? A. Yes.

Q. What would be the normal content or— A. Well, theoretically zero and in practical terms certainly less than .01.

Q. And .01 is what you found to be in— A. No, .09.

Q. Is that in any way correlated with the system used by the Memphis Police Department in determining whether a person is under the influence? A. Yes, sir.

Q. Do you know what the standards of the [263] Memphis Police Department are with regard to or the breakoff point with regard to whether or not one is under the influence? A. Well, this is state law, this is predicated on state law which establishes that a level of .10 is the point of intoxication.

Q. And this level was what? A. .09.

Q. It is just right below? A. Well, it is .01 below, right.

Q. Of course, you can't ascertain what the source of the alcohol is? A. No.

Q. But presumably it is something that is taken or ingested? A. That's correct.

Q. And you said possibly drinking a beer? A. Well, I used beer only as an example, not as an indication that it was, in fact, the beverage used.

Q. Could it be whiskey? A. Whiskey, wine, vodka, gin, any alcoholic beverage.

Q. You further indicated, Doctor, that the wound to the head was entered from the right * * *

* * *

TESTIMONY OF VELTON J. ROGERS

* * *

[633] VELTON J. ROGERS,

having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KLEIN:

Q. State your name, please. A. Velton J. Rogers.

Q. Where do you live, Mr. Rogers? A. 3484 Felton Road.

Q. Is that in Memphis? A. Memphis.

Q. What is your occupation, please, sir? A. Probation officer.

Q. With whom are you associated as a probation officer? A. Memphis and Shelby County Juvenile Court.

Q. Are you here today in answer to a subpoena of which I asked you to bring certain records with you? A. Yes, sir.

Q. All right, and do you have those records with you, please, sir? A. Yes, sir.

Q. All right. And who do those records pertain to, Mr. Rogers?

• • •

[657] A. Yes, sir.

Q. All right. What matter did you handle personally involving Edward Eugene Garner? A. I handled a matter concerning burglary back in really November of '73, and violation of curfew that occurred in October '73 and a burglary that occurred July '74.

Q. July of '74? A. Yes, sir.

Q. All right. Tell us about the first burglary, what brought, what are the facts surrounding that or how did it come to your attention? A. He was arrested as a result of he and several other younger boys, he was twelve at the time, going into the Porter Leath Home at 850 North Manassas. They placed a charge of burglary in the third degree against him. Seems like they went through a window and went into the place. It wasn't an actual break-in as such, but it was an illegal entry.

Q. I see. Did you handle that matter? A. Yes, sir.

Q. Who did you deal with in the family, do you remember? A. Edward and his father, I'm pretty sure.

Q. Go ahead, if you need to refer to something [658] A. He and his father.

Q. All right. What was the outcome or disposition of that matter? A. He was placed on probation.

Q. All right. Was he placed in the custody of his parents? A. Yes, sir.

Q. Any instructions given with regard to or any terms of probation? A. Well, I was—there should be. I can't verify that because we have an auxiliary probation service and we refer this—this ends my dealing with them once he's placed on probation. I make referral to the

auxiliary service and they set the instructions. We have the rules or form.

Q. What did the rule generally cover, times when curfews or limited activities anyway? A. Yes, sir, they say a child shouldn't be, we leave blank the time and the supervising probation officer from the auxiliary services is the one who sets the time and says that he shouldn't be out past whatever time they put in the blank without being with the parent or guardian or some responsible person whom the parent approves.

Q. All right. What was the next, I think you [659] mentioned curfew violation, is that correct? A. Yes, sir.

Q. What did that involve? A. Being out past midnight. It was a matter for my understanding in talking to him where he had permission to work at a close-by like sundry store and while some incident occurred there on the street and he went out to look at it and while the officers were there they saw that he was quite young and talked to him, and being out past midnight they issued him—well, I guess they arrested him.

Q. All right. What was the disposition of that? A. That was adjusted, non-judicial after warning and counseling.

Q. All right. Was he again placed in the custody of his parents? A. Yes, sir, he was not at the time under supervision and we didn't, because he had served the first period of probation and we didn't reactivate his probation.

Q. And what is the next event that you have recorded? A. Burglary, second degree.

Q. Burglary, second degree? A. Yes, sir.

[660] Q. What is the date of that? A. Of June 30, 1974.

Q. June 30, 1974. All right. What does that involve? A. That had to do with an incident—well, the parent brought this to the attention of the police officers.

Seemingly he had gone into a close neighbors home and obtained some money in a jar, I think it was in a jar, and the family found out about it and called the police to rect.fy the matter. They didn't arrest him. At that time they issued him a juvenile summons and he was later summoned into the court.

Q. All right. And what was the disposition of that? A. He was given a suspended sentence, commitment as we call it, and placed on probation.

Q. Well, what was the commitment, in other words, how does the sentence read? A. When read the petition sustained committed to the Tennessee Department of Corrections, commitment suspended and placed on probation.

Q. All right. And what does that probation mean. A. It means that he's to stay out of trouble • • •

• • •

• • • [664] as they could have been had he been home and that the mother was not able to provide the supervision that they needed at the time.

MR. KLEIN: That's all I have.

THE COURT: You may examine.

MR. DAYS: All right, Your Honor.

CROSS EXAMINATION

BY MR. DAYS:

Q. Mr. Rogers, I believe you indicated that at the time that Edward Eugene Garner was brought to the attention of the juvenile authorities for a curfew violation that he received a certain type of counseling, is that right? A. Yes, sir.

Q. Would you indicate briefly what the nature of that counseling was? A. Basically it is a warning, this was a little different from the normal violation of curfew.

Informal circumstances you just find a kid out, but with the, after talking to him and with the parents and finding that there was justification for him being there and that they had this set up where the owner of this place would deliver him home, and seemingly he was under supervision, so we just [665] talked about it and made sure that it wouldn't happen any more. And we left, you know, we didn't feel that punishment or any type of supervision probably was necessary at that time.

Q. Did you have occasion to discuss with Edward the circumstances of the first charge? The burglary at North Manassas? A. Yes, sir.

Q. And do you recall what he indicated or based upon your discussion with Edward did you come to any conclusion about the circumstances surrounding this particular incident? A. Yes, sir. Now, in referring back to the note I made that Everett stated that he, Michael Eason and Jeffery Beckton did break into the Porter Leath Home. They were playing in the yard and decided to go through a window. They ran when the police came. They had been into the building prior to on a prior date, this was basically what they told me.

Q. And do you know what the age of the other boys' were at the time, were they older or younger? A. They were fairly close the same age. One of them seemed to be younger because I can remember making an adjustment in the case due to his age or something, about ten years old or something.

• • •

TESTIMONY OF JAY W. HUBBARD

• • •

[577] JAY W. HUBBARD,

having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KLEIN:

Q. State your name, please, sir? A. Jay W. Hubbard.

Q. How do you spell your first name? A. J-a-y.

Q. And you reside where, sir? A. Currently in San Juan Capistrano, California.

Q. What is your occupation? A. Western regional manager for Guardsmark, Incorporated.

Q. All right, sir. Were you formerly the director of police for the city of Memphis, Tennessee? A. I was.

MR. DAYS: Excuse me, may I ask that the witness speak up, I have difficulty hearing.

THE COURT: If you will, please.

THE WITNESS: Yes.

Q. (By Mr. Klein) And how long did you hold the position as director? A. Almost exactly two and a half years.

• • •

[583] A. Yes, they were.

Q. All right. Are you familiar with a particular incident involving officer Hymon? A. I am.

Q. Do you know of your own knowledge whether that matter was presented to the Shelby County Grand Jury? A. Yes.

Q. Do you know the results of the Shelby County Grand Jury's deliberations in that case?

MR. DAYS: Objection, Your Honor, until the counsel is able to elicit from the witness the basis of his personal knowledge.

THE COURT: I'm going to overrule the objection. As I understand the question he asked him to his personal knowledge and the witness responded, yes.

Q. (By Mr. Klein) What was the outcome of the grand jury investigation? A. No true bill.

MR. KLEIN: Your Honor, I know we have been into this before and it may be objectionable. I will tell the • • •

• • •

• • • [595] variations, but I think that pertains to what extent that is weighed. I think I will overrule the objection on the basis of relevancy.

MR. DAYS: Very good.

THE COURT: You may proceed in the other area and if counsel has objection to any of that line of inquiry, I'm sure that I will hear from him.

Q. (By Mr. Klein) All right. Did you review the matter, the firearms review board findings in connection with officer Hymon? A. I did—

Q. And what were the conclusions by the board? A. The conclusion was that the use of deadly force was justified.

Q. All right, sir. Do you know whether any action was taken against Officer Hymon as a result of the use of deadly force? A. There was no punitive action. The customary relief from duties pending outcome of the investigation. Our officers sometimes think that is punitive, but it has no such purpose, there was no action taken.

• • •

TESTIMONY OF LESLIE BURTON WRIGHT

• • •

[672] LESLIE BURTON WRIGHT,

having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KLEIN:

Q. State your name, please, sir. A. Leslie B. Wright.

Q. How do you spell your last name? A. W-r-i-g-h-t.

Q. Where do you live, sir. A. 1221 Abernathy.

Q. Is that in Memphis? A. Yes, sir.

Q. What is your occupation? A. A policeman with the Memphis Police Department.

Q. How long have you been with the Memphis Police Department? A. Two years and ten months.

Q. All right, sir. Did you go through the academy, the training academy for new officers? A. Yes, sir.

Q. Do you remember what session you went through? A. The 37th.

Q. The 37th session?

• • •

• • • [674] certain wards? A. We were assigned to a particular ward that night.

Q. All right. What is a ward, is that a geographical— A. Yeah, just an imaginary area with imaginary boundaries which you stay inside and answer calls in that ward.

Q. And were you all in a patrol car at that time? A. Yes, sir.

Q. Now, what ward were you in on that evening? A. We were assigned to the ward designated 128.

Q. 128, all right. Do you recall getting a call with regard to a breakin at 737 Vollentine that evening? A. Yes, sir, it was a prowler inside call.

Q. And who received the call? A. I did.

Q. Is that the way that it came over to you? A. Yes, sir, it was put out by the dispatcher as a prowler inside.

Q. What did that indicate to you?

• • •

[677] Q. All right. Now, is it accepted practice for you to go outside of your ward? A. Well, that is a pretty busy area of town and when a car is out of service in an area they usually send the next closest available car to answer calls in another ward, particularly if it is a more serious type call, and prowler inside is a fairly serious type call.

Q. Does the call come out to anyone on the network or comes directly to a particular car? A. At that time on the radio system we were using, all of the cars running in the north precinct area would have heard the call, but we were the only ones who would have acknowledged it, and our call letters were 128, so it comes specifically for us to respond.

Q. Did you all acknowledge? A. Yes.

Q. All right. Then you proceeded on, you finally made it to Vollentine? A. Yes, sir.

Q. And where did you go then? A. We stopped right in front of 737, in front of the street and there was a female black standing in front of that house, either on the[677] porch or on the ground. She was in her night—housecoat or nightgown, it wasn't normal street wear, I remember, and she was pointing to the house next door which we found later was 739 Vollentine, and she was moving her mouth but both of us were inside the car, and, of course, the engine was running and couldn't hear

anything. So my partner opened the door and got out and went over to her and she was still pointing and she wasn't saying anything. Finally, I was leaning over in the street like this trying to hear what she was saying through the open door. She said, "Somebody is breaking in there right now." And she is still pointing to 739. So my partner comes back to the car and gets his flashlight and says, "Show us on the scene." I hadn't advised the dispatcher on the radio that we had arrived on the scene, which is the proper procedure that you are supposed to do, let him know that you have gotten to the scene. So he gets his flashlight, he says, "Show us on the scene" and gets out of the car, actually just leaned in and picked it up and went down toward the south of 729 along the west side of that house, and I get on the mike and turned, just turned the car into the curb to where it was almost, or almost in front [679] of 729 and advised the dispatcher once that we were on the scene and another transmission from some other car, so we didn't acknowledge it, so I advised him again, "128 at the scene." And he acknowledged it, so I just opened the door and got my flashlight and I went around the northeast, to the northeast corner of the house, 739—yeah, it is northeast, and I was shining my flashlight and looking along the, it was the fence along the left side of it, it was a driveway, as I remember it was all concrete and I was looking along the fence to see if there were any breaks and down to an outbuilding there that was at the end of the fence, I thought it was a garage at first, but I later found out it was too small to be a garage. And I heard the screen door slam, sounded like a screen, wooden screen door from the back of the house and I heard my partner yell, "Halt" and then there was a short pause, a couple of seconds, and I heard one shot. And at that time I ran to the back corner and there hadn't been any verbal communication after the

shot, I didn't know whether someone had fired at my partner or he had fired at someone else. So I came around the corner of the house slowly shining my flashlight.

[680] Q. Which corner of the house are you talking about? A. Now, that is the southeast, that is the back corner.

Q. All right. Let's look at this, if you would, please, sir, and this has been marked Exhibit 6. It has already been introduced into evidence. And ask you if you will just assume that this is the house at 739 with the back yard, and what I'm pointing to now has been referred to as a chain link fence five and a half to six feet tall with the direction, the front of the house faces north, the back of the house faces south, and if you would point out which side of the house that you went down and where you were when you heard the shot? A. Let's see. I pulled the car in here and I got out of the door and I ran around, there is a picket fence that is not shown. I ran around it, come down to the right here, when the, when I heard the screen door slam and my partner yelled, "Halt", and as soon as I heard that and my partner yelled, "Halt", I stopped momentarily and then I heard the shot and then I ran around, there is a window air conditioning unit that stuck out here, and I ran around it, come down to this corner right here and came around this [681] corner slowly shining my flashlight in this direction.

Q. You say "this direction", you are talking about which— A. That is going to be west, yeah, west over in this direction to try and pick up my partner. My partner had his flashlight out, too, and his pistol drawn, and I had my pistol drawn, and he pointed out with his flashlight and said that "He's on the fence." And I swung my light along the fence here until I come to the subject who was draped over this chain link fence right here, right just the edge of this small outbuilding. He was

draped over, torso, arms and head draped over on the south side of this chain link fence and legs draped over the north side right in the bend of the body just where the hips join the abdomen, and there was a large volume of blood coming from the head of the subject in a steady stream about three quarters of an inch in diameter. Really the most I had ever seen. And I was standing about here, and I took a couple of steps closer and I said, I said, I better go get an ambulance. And I believe my partner said, "Yeah, it looks like he's hurt pretty bad." He was moving toward the subject, so I ran back around the front of the house to the front of the car. We weren't • • •

• • •

[694] Q. For the cameras taking the pictures. Would you indicate again for the record and mark on exhibit 6 where you were when you heard the shot? A. Yes.

Q. Would you take this pen and mark it on exhibit 6 and put your initials next to it? A. Right here.

Q. All right. So you were at the northeast corner of the house? A. Yes, sir.

Q. And was it your testimony on direct that you heard your partner shout "Halt" at that point? A. The first thing that I remember hearing was the screen door slam and then my partner yelled "Halt".

Q. And you were at that same position when you heard your partner yell "Halt"? A. Yes, sir.

Q. I believe you indicated in your direct testimony that there was no verbal communication between you and your partner until after the shot, is that correct? A. Yes, sir, on my part.

Q. And I believe you testified that your partner at some point indicated that he's on the [695] A. Yes, sir.

Q. Did that occur before or after the shot? A. After the shot.

Q. Now, when you got to the back of the house after the shot, were you able to see your partner? A. Yes, sir, after shining the flashlight.

Q. Did you see your partner after you got back there move from his position to where the body was located? A. I didn't see him move. He was standing still as I remember when I came back to the yard and he said he's on the fence and indicated with his flashlight the direction, and as I was scanning toward the fence and caught sight of the body and moved toward the subject, my partner must have been moving as I was doing that because I didn't actually see him move, no.

Can you estimate how long it took your partner to get from where he was to the location of the body? Just try to give your best estimate? A. Three or four seconds.

Q. All right. Did you have any involvement of taking the body off the fence? A. No, sir.

• • •

TESTIMONY OF F. J. WHEELER

• • •

[697] F. J. WHEELER,

having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KLEIN:

Q. State your name, please, sir. A. F. J. Wheeler.

Q. And you are employed by whom, sir? A. Memphis Police Department.

Q. And what is your rank, please? A. It is sergeant.

Q. And how long have you been with the Memphis Police Department? A. Be 14 years this coming October.

Q. O.K. Are you assigned to any particular department or division? A. To the homicide division.

Q. And how long have you been assigned to the homicide division? A. A little over three years now.

Q. All right. Back on October 3, 1974, were you assigned to the homicide division? A. Yes, sir, I was.

Q. All right, sir. Are you familiar with the incident that involved a shooting out at 720 • • •

• • •

[701] MR. BAILEY: What does to an effect—I object, the witness said he doesn't know what Mr. Garner said and Mr. Klein I suppose is asking him for paraphrasing his version of what the witness said by saying to the effect, and I object to it.

THE COURT: We will treat the objection this way, as to what the witness's impression may have been, the objection may be well taken. If the witness is recalling or trying to recall to the best of his recollection what was said, though it may or may not be verbatim, he may be asked but if all that he has is a general impression, I think the objection may be well taken in that regard.

Q. All right. Do you have a recollection of what in substance was said? A. Only one thing. He did state that he did not want to go—he did want his son to go and that he had been expecting something of this nature to happen. As far as his exact words I can't remember, but it was to the effect that we have been [702] expecting something like this to have happened.

MR. KLEIN: That's all I have.

THE COURT: You may cross examine.

CROSS EXAMINATION

BY MR. BAILEY:

Q. Sgt. Wheeler, you investigated many homicides since this one, have you not? A. Yes, sir.

Q. And I take it that your recollection actually is a bit fuzzy as to what Mr. Garner said, isn't it? A. He was upset, Mr. Bailey, but, no, sir, I do know to the effect that they had been expecting something like this to happen.

Q. Well, he was in a state of shock when you told him— A. Well, I don't say shock, but he was visibly upset.

Q. And he was crying? A. Yes, sir, he was.

MR. BAILEY: I have no further questions.

THE COURT: Anything further?

MR. KLEIN: No, sir.

THE COURT: You may step down.

(Witness excused.)

• • •

(Caption Omitted)

AFFIDAVIT

STATE OF NEW YORK)
)SS.:
COUNTY OF NEW YORK)

WILLIAM R. BRACEY, being duly sworn, deposes and says:

1. I am a United States citizen and a resident of New York State. I am the Chief of Patrol in the New York City Police Department. I supervise the Patrol Service Bureau and command 17,500 officers, a force that comprises 80% of the personnel within the Department. Patrol Services handles all types of police services except

those calling for the use of Detectives. I am the fourth ranking official within the New York City Police Department and exercise direct authority over all officers of Assistant Chief and below.

2. I have worked as a police officer for thirty-four years. I began my career in 1946, working as an officer in Bedford-Stuyvesant, Brooklyn. After eight years I was promoted to Sergeant and moved to the Borough of Queens, then a predominantly white neighborhood. I was the first black Police Sergeant ever assigned to Queens. In 1959 I was promoted to Lieutenant and assigned as a desk officer in a Precinct on the east side of Manhattan, where I worked for eleven years. In 1970 I became a Captain and was moved to the Central Harlem Precinct. Two years later I was promoted to the rank of Deputy Inspector and the following year, in 1973, was named an Inspector and sent to Brownsville in the Borough of Brooklyn. Later in 1973 I was promoted to Deputy Chief, becoming second in command of the police forces in Brooklyn, a force of 2800 officers charged with serving a population of about two million. I was elevated to Assistant Chief and became the borough Commander. Finally, on March 23, 1978, I was appointed to my present post as Chief of Patrol.

3. During my career I have belonged to a number of professional law enforcement organizations. I was one of the founders of NOBLE, the National Organization of Black Law Enforcement Executives, and for three years was its recording and corresponding Secretary. Presently I serve as NOBLE's Sergeant-at-Arms.

I am also a member of the IACP, the International Association of Chiefs of Police, serve on its Committee on Arms, and have addressed IACP workshops on the use of deadly force. The Guardians Association, an organization of black policemen, and the Policeman's Benevolent Association are among the other professional groups with which I am affiliated.

4. I graduated from Alexander Hamilton High School in Brooklyn, New York. I have taken a wide variety of courses at Baruch College and John Jay College and have earned the equivalent of fifty-eight college credits.

5. With regard to the use of deadly force, the New York Police Department policy since 1973 has allowed an officer to fire his weapon only if he feels that his life or the life of another person is in danger. Our policy also dictates that there be no firing at moving vehicles, no firing of warning shots and no shooting of animals. These rules are strictly enforced with mitigating circumstances given appropriate weight. What we emphasize, however, is that officers seek alternatives to using their weapons. We urge them to seek cover, to call for assistance and to use the full range of their training and sophisticated equipment to apprehend suspects without loss of life.

6. Guidelines are very important. This cannot be stressed enough. But reduction in firearm discharges cannot be accomplished unless officers are made to obey strict guidelines. The key to actual influence exercised by regulations is the support these regulations receive from the top of the police bureaucracy. The police leadership must make it clear that regulations are to be followed and that officers who violate regulations will be disciplined. Otherwise, it becomes quickly known that strict-sounding regulations are "just for the record" and have no real bite. This is not to say that police officers should constantly be second-guessed. Their judgments, viewed in the light of Department guidelines, must be viewed realistically. But it is important that those in authority within police departments enforce deadly-force regulations and that they stress the need to use alternatives to firepower that will decrease the risk of unnecessary injuries and deaths.

7. The tightening of the deadly-force regulations has had a considerable impact. The reforms instituted in 1973 have reduced firearms discharges by at least 30%. (See Exhibit A.) This reduction in unnecessary use of firearms has not hampered the New York Police Department's pursuit of effective law enforcement. Nor have the tightened regulations threatened the safety of our officers. In fact, just the opposite is true; regulations have enhanced police safety. Four officers were killed last year, a year which saw the fewest firearm discharges in the history of the New York police. In contrast, eleven policemen died in 1972, the year before the current policy went into effect. Moreover, the rates of assaults decreased in the wake of the tighter deadly-force guidelines.

8. One reason why we think that restrictive deadly-force policies enhance the safety of our officers is that they become more aware of the need to act with prudence and to employ tactical procedures which minimize the situations where officers shoot or are shot at. Strict rules discouraged sloppy and unnecessary handling of weapons which pose a threat not only to civilians but to officers as well. Furthermore, as noted previously, there is no indication that police adherence to regulations curbing the use of deadly-force has encouraged a higher rate of attacks upon officers. Here it needs to be emphasized that the rationale behind strict policies it not to restrict *necessary* resort to firearms, but only unnecessary reliance upon deadly-force.

9. Evaluating an officer's resort to deadly-force is a complicated matter. Officers should be judged by a different standard than that applied to the conduct of civilians. On the one hand, this standard should be more strict since the officer is a professional trained to act with prudence and due consideration of alternatives even

under pressure. On the other hand, because an officer has been trained and is the person who actually makes these difficult decisions under pressure, I am loathe to second-guess him unless it is obvious that his judgment was poor.

10. Training is a key phase in our effort to reduce unnecessary resort to deadly force. In the first two years after we tightened our deadly-force regulations, all the training units in all the boroughs of the city devoted about an hour a day to discussion and questions about the new rules. We made sure that these discussions were led by officers of high rank, Captains or above. This campaign to thoroughly familiarize Department personnel with the changes in policy and the reasons behind these changes has undoubtedly exercised a positive influence. More important, though, than these initial efforts have been our consistent and continuing efforts to train officers in such a way that they will utilize firearms only as a last resort. The Department provides officers with extensive shooting practice at the range so that if they are forced to shoot they can do so effectively. But the Department also uses classroom discussion, film, and simulation training. By acquainting an officer as fully as possible with what he can expect on the streets, we hope to allay the jumpiness that sometimes causes errors in judgment. Often, for instance, ill-trained officers will exaggerate the danger posed by particular suspects. We try to train our officers so that they can quickly come to a realistic appraisal of the degree of danger they face in a particular situation. Even more importantly, we stress throughout our training process that good police work includes doing everything possible to heighten safety and preserve life. What we try to promote is not the macho image of the cop but the need for highly professional law enforcement.

11. Disciplinary procedures comprise another important aspect of our effort to discourage unnecessary resort to firearms. Anytime an officer discharges his weapon—whether or not it results in injury—he is required to report the incident to his commanding officer. In all cases our process of investigation and discipline proceeds as follows: A Duty Captain investigates a report of firearms discharge. He does this immediately for experience has taught us the necessity of eliciting testimony and collecting evidence while the incident is still "hot." This Captain files his report of the initial investigation with the Precinct Commander and the Chief of Patrol. The Precinct Commander is required to submit a report of his own investigation of the incident within 72 hours if possible. Periodically reports of firearms discharge incidents are reviewed by a Borough Firearm Discharge Review Board, a board comprised of a Borough Commander, an Inspector, a Captain and a line police officer. This group makes its own recommendation regarding the disposition of a case and passes on its evaluation to the Headquarters Review Board, chaired by the Chief of Operations. The Headquarters Review Board makes the final determination regarding the disposition of an incident. In those instances where the firearms discharge is not within the guidelines, disciplinary measures include official censure, instruction of the guidelines, retraining, change of assignment, loss of pay for a certain amount of time, suspension, or, upon occasion, discharge.

12. It requires special effort to make a disciplinary process operate with fairness and integrity. Police officers are naturally going to empathize with other police officers, for we have all faced difficult situations when it would have been easy to have made the wrong sort of decision about using our weapons. That is why I usually find it difficult to second-guess officers without good reason.

There is, however, no excuse to disregard restrictive policies and their enforcement.

13. The best way to insure the integrity of the disciplinary process is by leadership from above. When line officers see their superiors are serious about deadly-force regulations they will tend to observe these regulations since indifference might pose a threat to present assignment and career advancement. This leads me to a final point concerning intra-Department discipline: the necessity for official criticism of unnecessary recourse to firearms. Police officers take pride in their performance and are sensitive to criticism from their superiors and colleagues.

14. From my experience it seems that shooting a fleeing felony suspect is mostly related to an officer's urge to punish a criminal. This instinct for punishment is especially strong when the suspect is thought to have just committed a violent crime. Much of the resistance we faced when the Department tightened its deadly-force regulations was grounded in the feeling that criminals deserved no chance of escaping punishment and that the punishment of being shot when fleeing from a police officer was not excessive.

15. It takes time, patience and constant effort to nudge old attitudes into line with new, professional, more restrictive deadly-force policies. It can be accomplished.

16. Turning to the case at hand, the situation in Memphis, Tennessee, it appears to me that a definite message was transmitted in 1972-1973 when the police department there reiterated its policy of shooting "to stop" and at the same time introduced the use of dum-dum bullets. The message transmitted to line officers would seem to suggest the department's support of firearms use. If

dum-dum bullets had always been used, the fact that they are deadlier that other more conventional ammunition would not be so significant. Their importance in the Memphis situation is likely to have stemmed from their newness, the fact that they were introduced seemingly in tandem with the renewed emphasis on shooting to stop.

17. Unlike Memphis, the New York City police department does not use dum-dum bullets. We believe that conventional .38 caliber ammunition is potent enough for our needs. We do, however, believe that when it is necessary to shoot, an officer's duty is to stop immediately and fully the aggression of the suspect.

18. In terms of training, I think that heavy reliance upon films like "Shoot, Don't Shoot" poses some problems. In the first place, such films present some unrealistic situations which ill prepares officers for what they will face at their posts. More importantly, such films tend to leave some officers far too jumpy. Rather than reliance upon films, we emphasize actual simulation of bank robberies and other violent police-criminal confrontations. While we provide intensive training in firearms use, we stress seeking alternatives to firearms: taking defensive or holding positions, asking for assistance and other tactical options.

19. With reference to the statistics suggesting that 50.6% of the police shootings in Memphis involve those suspected of crimes against property, I can only say that such a trend seems wrong and excessive, particularly if one believes in the doctrine of letting the punishment fit the crime. Teamwork, effective use of communications systems and good detective work is more than adequate to apprehend the vast majority of fleeing suspects no matter what the crime.

20. I react negatively to the policies of the Memphis police Internal Affairs Board insofar as those policies include subjecting those who complain of police misconduct to polygraph tests. Making the complainant take a polygraph test immediately while exempting the officer complained of is an unjustified double standard. This practice is bound to discourage many citizen complaints.

21. It is very difficult to comment on the actions the police officers took in the *Garner* case since I am not intimately and thoroughly familiar with the facts and total content of the tragedy. I can say, however, that in a similar situation as that faced by the officer in question, several alternatives should immediately spring to mind that could avoid resort to deadly-force. Using a radio to summon assistance is nearly always correct tactically. With a quick call for assistance, a fleeing suspect can be eventually caught even if he does manage to escape temporarily. Or if the suspect is unarmed, moving up on him quickly with a drawn nightstick and an air of determination will do wonders toward halting a suspect thinking about fleeing. The point is that in most cases there are alternatives to deadly-force if officers are expected and trained to reach for these options.

/s/ William R. Bracey

Sworn to before me this 20th day of June, 1980.

/s/ Ivalina R. Pease
Notary Public, State of
New York
No. 41-4526988
Qualified in Queens County

Commission Expires March 30, 1982.

EXHIBIT A

Incidents of Firearm Discharges By New York City Police Officers 1971 to the Present

	1971	630
	1972	803
	1973	556
	1974	470
	1975	439
	1976	374
	1977	414
	1978	372
	1979	364
January - June	1980	160

(Caption Omitted)

AFFIDAVIT

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

LAWRENCE W. SHERMAN, being duly sworn, deposes and says:

1. I am a United States citizen and a resident of Washington, D.C.

2. I hold a Bachelor of Arts Degree from Denison University, a Master of Arts degree from the University of Chicago, and a Ph.D. degree from Yale University.

3. I am presently Director of Research at the Police Foundation in Washington, D.C. Other posts I have held

include the following: Executive Director, National Advisory Commission on Higher Education for Police Officers; Director, Project on Homicide by Police Officers, Criminal Justice Research Center, Albany, New York; Consultant to Civil Rights Division, United States Department of Justice; Consultant to Solicitor General of Canada. I have also served as a consultant to several metropolitan police departments including those in New York City, Dayton and Kansas City. I have served as an expert witness in four prior court cases involving police use of firearms and have spent several thousand hours riding in patrol cars in ten American cities and four European cities observing police decide whether or not to resort to firearms. Finally, I have written extensively in the area of police administration and police behavior. My publications include *Scandal and Reform: Controlling Police Corruption* (University of California Press, 1978); *The Quality of Police Education* (Jossey Bass Publishers, 1978) with National Advisory Commission on Higher Education for Police Officers; *Team Policing* (Police Foundation, 1973); "Measuring Homicide by Police Officers," 70 *Journal of Criminal Law and Criminology* 546 (1979) with Robert H. Langworthy; "Execution Without Trial: Police Homicide and the Constitution," 33 Vanderbilt Law Review 71. In addition to these publications I have written about twenty-five other articles or chapters in books, and serve as the *Criminal Law Bulletin's* Contributing Editor for Law Enforcement.

4. Guidelines are extremely important. The best available empirical evidence clearly indicates that even minor changes in the direction of restricting firearms use will reduce the number of citizens shot. These changes in regulations must, however, be supported by strict enforcement if they are to become effective.

5. Extensive statistical studies by James J. Fyfe and others indicate that reforms restricting police use of deadly-force reduce the numbers of citizens shot without causing corresponding increases in crime or assaults upon police officers (see Exhibit A). My own research has verified Fyfe's conclusions. In Kansas City and Atlanta, changes in police deadly-force regulations have substantially decreased the number of citizens wounded or killed by police firearms. At the same time, neither of these cities has experienced an increase in crime as a result of more restrictive policies. In Atlanta, moreover, there was no increase in assaults against officers. Data on the number of police assaults following the change of regulations in Kansas City is not available. But in New York, the number of assaults against police decreased substantially after policy reforms tightened the rules governing police use of deadly force.

6. Even more important than regulations however, is strict enforcement of rules curbing unnecessary resort to deadly force by police officers. If enforcement is strict, strong guidelines will quickly exercise significant influence on the conduct of officers. The message will go out that the Department is serious about its deadly-force rules. If enforcement is lax, the opposite message will be transmitted, no matter what the regulations themselves actually prescribe as required conduct. The point, then, is that the tone of enforcement and the attitude of a police administration are equally as important as formal rules in the successful implementation of restrictive deadly force policies. Thus, the cities that have been most effective in curbing police resort to deadly force have been those where the ranking officers have created an atmosphere of administration sypmathetic to restrictive policies.

7. One method of enforcing strict discipline with regard to the use of firearms, is for police departments to investigate every single firearms discharge whether or not the incident involves injury or death. This process of extensive review is used in New York City (and Atlanta) and has probably played a significant role in that city's effective campaign against unnecessary resort to deadly force by the police.

8. Training is also an important factor in reducing police use of firearms. Based upon my experience with firearms decision training in New York City, the most effective training techniques involve simulation drills which accustom officers to processing the ambiguous situations they are likely to encounter in the course of their work. Drills where officers actually have people jump out at them suddenly or where officers have to quickly appraise whether someone is a suspect or a victim add to the readiness of an officer to face his duties with added poise and a disciplined readiness to use alternatives to deadly force.

9. In my view, the Memphis Police Department's policy regulating the use of deadly force is deficient in several important respects. The policy includes no provisions concerning the protection of bystanders. In contrast, both the Model Penal Code and the 1977 President's Commission on Law Enforcement and the Administration of Justice recommend that use of deadly-force be prohibited when bystanders might be injured. More importantly, the Memphis policy insufficiently stresses the need of police officers to use alternatives to deadly-force in apprehending fleeing felons. What these significant omissions indicate is a glaring looseness in policy regarding police resort to firearms. It is clearly inappropriate, for instance, for police guidelines to allow officers to use deadly force against fleeing property crime suspects when convicted

criminals of these same violations are exempt from the death penalty and most often are sentenced to jail terms far less severe than life imprisonment. When property crimes were punishable by the death penalty, police use of deadly force against property violators at least rested upon an internal logic. Now, however, that logic has been shattered by charges in our conception of appropriate punishments. Under modern conditions, then, regulations allowing force to be used against fleeing suspects of property crimes is a dangerous anachronism.

/s/ Lawrence W. Sherman

Dated: June 20, 1980

Sworn to and subscribed before me this 20 day of June, 1980.

/s/ (Illegible)
Notary Public

My Commission Expires December 15, 1984

ABSTRACT

James J. Fyfe, Shots Fired: *An Examination of New York City Police Police Firearms Discharges.* (Ph.D. dissertation, S.U.N.Y., Albany) Ann Arbor, Michigan: University Microfilms, Internaitonal, (1978).

This study examines extreme police-citizen violence, focusing primarily on police firearms discharges. Its major data sources include New York City Police Department records of all incidents in which members of that agency reported discharging their firearms and/or were subjects of "serious" assaults (e.g., assaults with deadly weapons; assaults which resulted in serious officer injury or death) during the period January 1, 1971-December 31, 1975. Numerically, these data include 3573 such incidents involving

4904 officers; 2926 of these incidents involve police shooting; 3827 officers reported firing their weapons.

These reports, supplemented by various New York City Police personnel records, were converted to computer mode and subjected to analyses directed at three major objectives:

1. Describing the Phenomenon: several hypotheses concerning the circumstances and participants in police shootings and other extreme violence were formulated and tested. In addition, the study sought (successfully) to derive empirical shooting incident, officer and opponent typologies. Finally, the study presents the marginal frequencies of several variables related to shooting incidents and officer shooters.

2. Analyzing the Effects of Direct Organizational Interventions upon Police Shooting Discretion: in mid-1972 the New York City Police Department promulgated administrative shooting guidelines far narrower than the formerly operative statutory limitations. Accompanying these guidelines were provisions for internal administrative review and adjudication of the actions of police shooters. Several hypotheses relevant to the effects of these interventions upon the frequency and nature of police shootings were formulated and tested.

3. Analyzing the Effects of Indirectly Related Organizational Interventions upon Police Shooting: several hypotheses concerning the effects of changes in such organizational variables as deployment and enforcement policies, formal reward systems and officer "layoffs" upon the frequency and nature of police shootings were formulated and tested.

Among the most significant findings of the research are the following:

1. New York City police shootings are predominantly an innercity, night-time phenomenon, whose geographic distribution is closely associated with those of rates of reported criminal homicide and rates of arrest for felonies against the person (murder/non-negligent manslaughter, felonious assault; forcible rape; robbery).

2. Blacks and Hispanics are disproportionately represented among police shooting opponents. These disproportions are closely associated with minority disproportion among perpetrators and victims of criminal homicide and among those arrested for felonies against the person.

3. New York City police shooting opponent age distributions apparently do not vary among the races, but are closely associated with rates of arrest for felonies against the person.

4. Black and Hispanic New York City police officers are far more likely to have fired their guns on duty than are Whites; this variation is associated with disproportionate minority officer assignment to the most hazardous duties and areas.

5. Black and Hispanic New York City police officers are far more likely to have fired their guns off duty than are Whites; this variation is apparently associated with the disproportionate presence of off-duty minority officers in the city's most hazardous areas.

6. Suicide is the data set's modal cause of officer death.

7. The New York City Police Department's major direct organizational intervention upon police shooting discretion was accompanied by decreases in the frequencies of reported police shootings, shooting opponent injuries and deaths and line of duty officer injuries and deaths.

8. The New York City Police Department's major direct organizational intervention upon police shooting discretion was accompanied by changes in the nature of reported police shootings.

9. The New York City Police Department's major direct organizational intervention upon police shooting discretion was apparently accompanied by changes in the reporting behavior of officers anxious to avoid discipline for proscribed shootings.

10. A change in New York City Police narcotics enforcement policy (from "Buy and Bust" to a program of pursuing "Higher-Ups") was accompanied by a decrease in the frequency of incidents of extreme violence involving narcotics officers.

11. The "layoffs" of the New York City Police Department's 3000 junior officers were not followed by a reduction of on-duty shootings, but were accompanied by a decrease in the frequency of off-duty shootings.

(Caption Omitted)

AFFIDAVIT

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

JAMES J. FYFE, Ph.D., being duly sworn, deposes and says: I am a United States citizen and a resident of Virginia.

1. I am an associate professor at The American University, College of Public Affairs, School of Justice and I submit this affidavit on behalf of Cleamtee Garner.

2. I was a member of the New York City Police Department for sixteen years, and retired with the rank of lieutenant in 1979. During my tenure with the New York City Police Department, I performed patrol duties for more than eight years in Brooklyn, Queens and Staton Island. I also held the following assignments: Chairman, Police Academy Police Science Department; Executive Officer, Police Academy Management Training Unit; Commanding Officer, Police Academy Management Training Unit; Coordinator, Executive Development Program; Director, Firearms Discharge/Assault Research Project.

3. During my tenure with the New York City Police Department, I designed a multi-media firearms training program in which more than 20,000 police officers have participated.

4. I hold a Bachelor of Science degree in Criminal Justice from the John Jay College of Criminal Justice, City University of New York. I also hold a Master of Arts degree in Criminal Justice from the State University of New York at Albany and a Ph.D. degree in Criminal Justice from the State University of New York at Albany.

5. I have held fellowships and grants for graduate study from the Ford Foundation, the National Science Foundation, and the New York City Police Foundation. I was an adjunct assistant professor of police science at John Jay College of Criminal Justice for four and one-half years.

6. I wrote a doctoral dissertation on the use of deadly force which anlayzed 2926 incidents in which 3827 New York City police officers discharged firearms between 1971 and 1975. These incidents are enumerated by year in Exhibit A attached. My doctoral dissertation was awarded the American Society for Public Administration's

Annual Award to the Outstanding National Contribution to Criminal Justice Administration in 1979.

7. I have written articles on police use of deadly force which have appeared in the FBI Law Enforcement Bulletin, the Journal of Criminal Justice, the Journal of Research in Crime and Delinquency and the Los Angeles Times. I have served as a consultant on police deadly force to the United States Department of Justice, Civil Rights Division; United States Department of Justice Community Relations Service; United States Civil Rights Commission; Chicago Law Enforcement Study Group; and the Police Foundation. Also, I have lectured on police use of deadly force at universities and professional meetings throughout the United States.

8. A major conclusion of my research and studies is that police use of deadly force to apprehend fleeing non-violent suspects is inconsistent with the concern for life characteristics of the operations of the rest of the criminal justice system.

9. A major conclusion of my research is that police use of deadly force to apprehend fleeing non-violent suspects does not deter criminal behavior or increase law enforcement effectiveness in any measurable way.

10. A major conclusion of my research is that police administrators can take direct action in the form of agency policies which will significantly reduce the incidence of police use of deadly force to apprehend fleeing non-violent suspects. This administrative action to reduce police use of deadly force to apprehend fleeing non-violent suspects does not endanger the lives and safety of police officers.

11. A major conclusion of my research is that minority citizens are disproportionately and negatively affected by police use of deadly force.

12. I have examined data provided by the NAACP Legal Defense Fund in connection with this case. Those data concern crime and police use of deadly force in Memphis, Tennessee during the years 1969 through 1974. I have compared those data to data on crime and police use of deadly force and firearms in New York City during the years 1971-1975. That comparison shows the following:

a) The annual rate at which Memphis police officers discharged firearms (33.45 shootings per 1000 officers annually) is 71 percent higher than that of New York City (19.60 per 1000 officers annually).

b) When controlling for risk of exposure to situations likely to precipitate police shooting, the rate at which Memphis police officers discharged firearms during 1969-1974 is nearly three and one-half times greater than the 1971-1975 New York City rate. During 1969-1974, Memphis police reported 36.98 shooting events for each 1000 violent crime arrests effected (murder non-negligent manslaughter; forcible rape; robbery; aggravated assault). The New York City rate was 16.71 shootings for each 1000 arrests effected.

c) More than half (50.7 percent) of the police shootings in Memphis during 1969-1974 involved shooting at property crime suspects. The comparable percentage in 1971-1975 in New York was no more than 11.3 percent. This comparison is not precise because the New York City figure includes all shootings to "prevent or terminate crimes." Thus, it includes shootings precipitated by both property crimes and crimes of violence. My estimate of the percentage of New York City police shootings which involved property crime suspects only is four percent.

d) Using the same figures described in "c" above, the average annual rate at which Memphis police fired

their guns at property crime suspects during 1969-1974 (16.95 shootings per 1000 officers annually) is at least 5.8 times greater than the New York City average annual rate during 1971-1975 (average annual rate of shooting to prevent or terminate *all* crimes = 2.90; estimated average annual rate of property crime shooting = 1.28).

e) The 1980 census indicates that 38.86 percent of the population of Memphis is black, but blacks accounted for 84.21 percent of the property crime suspects shot at by Memphis police during 1969-1974. Thus, the likelihood that black citizens were shot at as property crime suspects during 1969-1974 (rate = .40 per 1000 population) is approximately ten times higher than is true for white citizens (rate = .042 per 1000 population). The rate at which blacks were wounded in property crime shooting (.054 per 1000 population) is approximately 20 times higher than the white rate (.0026 per 1000). The rate at which blacks were killed in property crime shootings (.058 per 1000) is nearly six times higher than the white rate (.01 per 1000).

f) These great discrepancies hold true even when one controls for differential involvement among the races in property crime. Memphis police shot at 4.33 black property crime suspects for each 1000 blacks arrested for property crimes (burglary, larceny, and auto theft) during 1969-1974. This rate is more than twice as high as the white rate (1.81 shootings per 1000 property crime arrests). Black property crime arrestees were shot and wounded more than five times as often as white property crime arrestees (.586 black woundings per 1000 arrests, versus .113 white woundings per 1000 arrests). Black property crime suspects were shot and killed 40 percent more often than white property crime suspects (.63 black deaths per 1000 arrests, versus .45 white deaths per 1000 arrests). In

New York City, differential racial involvement in police shootings also exists, but it is almost totally accounted for by differential racial involvement in the types of activities likely to precipitate shootings.

g) Memphis police officers were more than 15 times more likely to have shot at black property crime suspects than at white property crime suspects during 1969-1974. More than one in five Memphis officers (206.06 per 1000) shot at black property crime suspects during 1969-1974, while approximately one in 75 officers (14.27 per 1000) shot at white property crime suspects. The rate at which Memphis police wounded black property crime suspects (11.60 per 1000 officers) was more than 13 times higher than the rate at which they wounded white property crime suspects (.89 per 1000 officers). The rate at which Memphis police killed black property crime suspects (12.49 per 1000 officers) was nearly three and one half times greater than the rate at which they killed white property crime suspects (3.57 per 1000 officers).

13. On the basis of these findings, I have reached the following conclusions:

a) The police shooting rate discrepancy between Memphis and New York City is almost totally attributable to the high incidence of Memphis police shootings at property crime suspects. These shootings could be reduced significantly by strong administrative action, such as that taken in New York City in 1972. Since that time, "fleeing felon" shootings have declined by 75 percent in New York City.

b) As a result of the Memphis Police Department's apparent tolerance of police shootings not precipitated by violent crime and not involving danger to police or citizens, black citizens of Memphis were far more likely to

have been shot at, wounded, or killed by police than were white citizens during 1969-1974.

c) For reasons which cannot be precisely identified from data made available to me, the individual black citizen of Memphis suspected of a property crime was far more likely to have been shot at, wounded, or killed by police than was the individual white property crime suspect. In other words, the data indicate that Memphis police responded with more force to black property crime than to white property crime during 1969-1974.

14. I have examined data on fatal police shootings in Memphis during the years 1969 to 1976. The source of these data is the report of the Tennessee Advisory Commission to the United States Commission on Civil Rights, *Civic Crisis-Civic Challenge: Police Community Relations in Memphis* 81 (1978). These data which do not include information on police shootings occurring between January 16 and December 31, 1982, indicate that 39 persons were killed by the Memphis police during the rest of the period between _____ to 1976. Of these, 26 were black, 8 were white, and 5 were not identified by race.

15. I analyzed these data to determine whether the blacks and whites among these victims were shot in similar circumstances. Table I, attached as Exhibit B, shows the results of that examination. The table shows that 1/2 (13) of the black victims and 1/8 (1) of the white victims were unarmed and none were assaultive at the time they were killed. Conversely, the table shows that 1/2 (13) of the black victims and 87.5% (7) of the white victims were reportedly engaged in assaulting behavior against police or other citizens immediately prior to the deaths, of these assaultive victims, 7 blacks (26.9% of total black deaths) and 5 whites (62.5% of total white deaths) were reportedly armed with guns when shot by police.

These are certainly dramatic differences, but no measure of their significance is possible. This is so because the only statistically significant category of whites killed is those armed with guns.

16. On the basis of this analysis, I have reached the following conclusions:

a) The circumstances under which the Memphis Police shot and killed citizens during 1969 to 1976 varied dramatically with the race of the victims.

b) Memphis Police were far more likely to shoot and kill blacks in non-threatening circumstances than they were to shoot whites in non-threatening circumstances in this period.

c) The great disproportion of black citizens shot and killed by Memphis Police between 1969 to 1976 is largely accounted for by the great number of black citizens shot in circumstances in which they presented little or no danger to police or other citizens. In those years, Memphis police shot or killed 0.6 armed and assaultive whites for each non-assaultive white killed; but they shot and killed nearly 2 unarmed non-assaultive blacks for each armed assaultive black killed.

17. I have examined the account of the fatal shooting of Eugene Garner set forth in the Sixth Circuit Court of Appeals opinion. My opinion of this case is that it involves a well-intentioned action on the part of a police officer who acted up to the expectation of his superiors. On the basis of the limited account available to me, I can find no fault with the officer, who did only what he had been trained to do by his superiors.

The larger question raised by this tragedy involves the validity of what the officer's superiors trained and ex-

pected him to do. It was not wrong for the officer to do what he was told; but it was very wrong that the officer had been told to do what he did. Had Garner been apprehended, tried in accordance with due process guarantees, and found guilty beyond a reasonable doubt of the burglary he is alleged to have committed, he certainly would not have been executed. He is dead, however, because of policy and training which authorized the summary shooting of non-dangerous suspects on the basis of suspicion or probable cause.

/s/ James J. Fyfe
James J. Fyfe

DISTRICT OF COLUMBIA: ss:

ON THIS DATE, before me, a Notary Public in and for the aforementioned jurisdiction, personally appeared James J. Fyfe, identifying himself as James J. Fyfe, and acknowledged himself as the person who executed this document as his free and voluntary act.

GIVEN under my hand and Notarial Seal, this 23rd day of June, 1980.

My commission expires July 1, 1984.

/s/ (Illegible)

EXHIBIT A

Incidents of Firearm Discharges By New York City Police Officers 1971 to the Present

	1971	630
	1972	803
	1973	556
	1974	470
	1975	439
	1976	374
	1977	414
	1978	372
	1979	364
January - June	1980	160

EXHIBIT B

TABLE 1.

Actions of Memphis Shooting Fatalities by Race 1969 to 1976

Victim Actions	Race of Victim Black	Race of Victim White
Non-assaultive	50.0% (n=13)	12.5% (n=1)
Assaultive - not armed with gun	23.1% (n=6)	25.0% (n=2)
Assaultive - armed with gun	26.9% (n=7)	62.5% (n=5)
Totals	100.0% (n=26)	100.0% (n=8)

DEPOSITION OF WYETH CHANDLER

• • •

[4] WYETH CHANDLER,

The witness, being first duly sworn, deposed as follows, to-wit:

DIRECT EXAMINATION

BY MR. ARNOLD:

Q. State your name and your position, please. A. Wyeth Chandler, Mayor of the City of Memphis.

Q. Mr. Chandler, you have talked with Mr. Shea about the purpose of this deposition and you know the case that this is about? A. Briefly. I get confused. May I ask you this?

Q. Certainly. A. Is this the one where the—is this the one where the juvenile was in a car that had been stolen, and ran and was shot?

Q. Yes, that's correct. A. Okay.

Q. This happened on January 12, I believe, 1972. A. Okay.

Q. And the person's name is Eddie Madison. A. Eddie Madison.

Q. The child who was shot.

Now, you had been Mayor how long at that point? A. Twelve days, I assume.

• • •

• • • [6] to them.

First of all, before we get to that, though, in January of 1972, there were several shooting incidents that occurred very quickly after you had become Mayor, is that correct? A. I'm not sure how quickly, but there were, it seems like three or four within a two month period, maybe three within three weeks.

Q. All right. And the incident that we are discussing is one of those. A. Right.

Q. And you remember it as being one of those that occurred in this short period of time? A. I sure do.

Q. Who was the Chief of Police at that point? A. I believe Bill Price was the Chief of Police. As I recall, Chief Lux had retired before I took office, and I'm not sure whether—I guess Bill Price was Chief of Police. I'm not sure. We had no Director. We were waiting on the appointment of a Director. My recollection is that Bill Price had been appointed Chief of Police.

Q. This was your appointment? A. It was.

Q. And I re-read this deposition, and what you • • •

• • •

[9] A. All right.

Q. The sentence there says: "For example, we have a situation that grew out of some deal where we had a stolen car situation in which a child ran out of a stolen car, and I think the child ended up mentally off or something. I don't know what. Gotten in a car with some other people and they bailed out and left him holding the bag, and he ran and so forth." And the question was: "And the shot?" And you answered: "And the shot."

And I believe that that is the situation that we are talking about here in this case. A. The only thing, of course, I'm not sure whether he was mentally off or what, but I remember, as the story was told to me, that was—that was the way I understood it.

Q. Yes, sir. We won't try to prove his mental condition through your testimony. A. No, that would be hard to do.

Q. This was the situation, then. I'm trying to focus on some of these prior statements.

Again, on page thirty-two, beginning with line eighteen, you made a statement and this was part of a previous statement, if you want to read the whole statement, it's fine, but the part that I think is referring to this incident says: "As I say, I think the one thing we did move [10] into this thing you will see is the car thief, that just the car thief alone, not connected to anything else, but just the car thief, you run him down, you get in the car, and he jumps out of the car and runs, you can't connect him to burglaries or robberies, he's nothing but a car thief, which is a felon, just never strikes me like a burglar or robber or murderer or rapist or et cetera. You know, he doesn't fit into that category with me. That's my personal opinion. I think I—I think it is in that area that I found some reason to relax it. That is because, you know, so many kids joy-ride, I hate to see them put in the same category with the burglar and robber and rapist and murderer, that type of guy. But that is just my personal opinion."

Again, I believe, in this situation you were talking about a change of policy which occurred after the incident in which the juvenile was shot as he ran from the stolen car. Is that correct? A. That's correct.

Q. And, finally, on page thirty-eight, line seventeen, you said: "I think if you have got a kid, you may have a joy ride, certainly you don't want to kill the kid, you know, but the time, January 8, 1972, and that is what I thought you were going to ask me, did I have a policy to shoot all fleeing felons, I say, no, they followed the policy of the State Law." [11] And if I may stop reading although that's in the middle of a sentence. Again, you were referring there to the general policy, but some different feelings you had about the situation of a kid joy riding in a stolen car, is that correct? A. Yes. The State Law, in my opinion, said they could shoot flee-

ing felons, and we began to relax that in certain areas, not only joy riders, but primarily embezzlers, fraud people and so forth. It may be a felony, but I didn't look on it as necessary to shoot them if they were about to escape.

Q. Now, at the time of this incident, January 12, 1972, again, we're going back a long time in your history as Mayor, if you would, I know you've just made mention to it, but tell me in as complete terms as possible what you understood the policy of the Police Department toward shooting—the use of deadly force, what you understood that to be. A. Well, I understood it to be, as far as I knew it, I'd only been in office for twelve days, but I had been on the Council and I had some knowledge, not total knowledge, of the Police Department, my belief, it is now, that it was their policy that you did everything within human power to capture a fleeing felon without the use of deadly force. But if it became apparent to you that a fleeing felon would escape, if not apprehended by the use of firearms, there was a policy of the Police Department to use firearms.

[12] Q. And, then, of course, in addition to that, the police could use firearms in self defense or defending another officer? A. Self defense, the protecting of someone else and so forth.

Q. When this—or when these instances occurred shortly after you became Mayor, you took it upon yourself to investigate the Department's policies and shortly thereafter a new statement was issued, is that right? A. That's true.

Q. Now, again, I know I'm asking you to go back a long way, but what did you do in that investigation? You must have called Chief Price in and you must have talked to some other people on the Force? A. I can't remember who all I talked to. I'm not even—if it's a

police matter, in all likelihood I read the files as much as I could and discussed the cases briefly.

Q. When you say "the files" are you talking about the three or four incidents? A. The three or four incidents where they were shot at, yes. The first time I remember conversing about this particular incident, I believe it was an incident involving a situation that I don't believe the police had any fault in, and that was where they shot a man where the Pepsi Cola driver had [13] called and said that—I guess, had an armed robbery and he had lied. And a youngster, I believe a young boy was shot. I'm not sure how young he was. But those two stick out in my mind. And it was simply my feeling that in cases of joy riding or in cases of felonies that don't involve physical force, threat of life, rape, so forth, those—threat of personal harm, or threat of—or certainly of stealing anything or being in a house or place of business where others might be, and, therefore, possible violence could occur, that we ought not to use firearms at all. Now, that was just my thoughts about it and I expressed them and felt that way about it. I know that it was not tied into the State Law, and I knew that, you know, State Law overruled anything, any policy I might have, but that was the policy I felt would be best.

Q. Now, did you understand that in the Police Department, in the past, that is, prior to this period of time in January of '72, that police officers had utilized deadly force against any situation where a felony might have been committed? A. Well, I didn't know whether they had or not. I really didn't make any study of whether, for example, they'd ever shot an embezzler who was fleeing. The primary thing I was—it was just something that was brought up in the discussion about the Fleeing Felony Statute. It was just my [14] feeling that as you don't apply it to an embezzler, that it should be in some

way, therefore, limited. As far as I knew, they had never shot an embezzler. To my knowledge, they had not. I assume they had not. But if you had the right to and didn't, as a policy, then we ought to extend that same right to the juvenile in a joy riding situation. That was basically the idea that I—so, we listed things that we felt you could use it for and left off those things which we, even though you may be able to under the State Law, that I didn't feel that you should.

Q. In fact, wasn't it clear to you that they would not have used force against say an embezzler? A. I would assume they would not. But inasmuch as they wouldn't do it against an embezzler, I just simply put the child, fleeing felon or joy rider in the same category.

Q. That's extend that principle to some other felonies? A. That idea, right.

Q. And I assume in fact that there are a lot of other felonies that you knew then that the police simply would not use force to capture such persons, and that would be in non-violent situations? A. Well, not necessarily non-violent. I didn't not—was requested and did not remove it, for example, I don't think from burglaries, which are not necessarily violent, but [15] that I have considered always as the type of things that can lead to violence.

Q. Well, now, I looked through the Code, the Tennessee Code this morning, just looking at a lot of different felonies, trying to figure out ones that I thought were in effect in 1972, and I found a lot that it appears to me the department has never used force when trying to apprehend such a person. I found one like in TCA 39-1907, it's a felony to issue false stock certificates. We can assume they've never used force in a situation like that? A. As far as I know, they have never—I would assume so.

Q. And, in fact, when you were having this discussion, wasn't that the general flavor of the discussion, that it was in certain situations, felony situations, it was used and in others it just was not used? A. That's why the end result, I believe, was a publication of those felonies that I felt you should use it.

Q. Now, prior to that publication that came out as a result of this meeting or meetings—was there more than one meeting? A. Probably so.

Q. Had there ever been a delineation of which felonies the department, in those situations where the department would • • •

• • •

[21] Q. Now, did you—you've seen this one before, haven't you? A. This statement here, yes.

Q. The last one I just handed you. A. Right. I'm sure I have.

MR. ARNOLD: I'd like to make that Exhibit 1 to your deposition.

(Whereupon, said STATEMENT was marked EXHIBIT 1.)

Q. Now, this is dated January 20, and on page three of that it says: "Firearms—" This is paragraph Roman numeral V: "Firearms shall not be discharged: A. As warning shots; or B. From a moving vehicle or to stop a fleeing vehicle except as provided for in Paragraph IV." And that last statement I read, V-B, reflects the change in your—in policy that resulted from these meetings, is that correct? A. No, I don't think so. That's one of the changes. I'm not sure about warning shots. I think Krelstein had been against warning shots and he brought that up.

The real change in the policy, as I recollect it to be, first of all, in writing down those things under A and B, and listing those things under II, by listing. In

other words, by saying, rather than "fleeing felons," you list the felonies that, if you can't apprehend a guy, you list all these things [22] that you can shoot, you can use firearms, you can use deadly force to apprehend him. Also, I think for the first time they had this report to be made and so forth.

Q. Yes. I believe Chief Lux perhaps had prohibited in 1969 the use of warning shots. A. That may be. That was something that was discussed.

Q. In Section IV-B-2, the auto theft has been eliminated from that list. A. Grand larceny has not been eliminated. I don't know whether auto theft is listed under grand larceny under the law or not. I can't tell you. I don't think, as I remember, that auto theft per se was discussed as needing to be eliminated. It was the joy riders that bothered me, not the auto thieves. I tried to make that clear earlier. I don't consider a professional auto thief as any less the type of guy that I would want to apprehend personally than a guy who would sneak into Joe's Barbecue and ransack his building, steal his money. One of the arguments was to eliminate burglary and this type thing, some kinds of burglary, which I did not do. I did not think it should be done. But I don't remember discussing auto theft as such. I do remember discussing children joy riding.

Q. Now, you understand then that this document we've labeled as Exhibit 1 excludes the situation where a person • • •

• • •

• • • [27] deplore.

Q. Well, actually, the policy was such that it allowed one officer to use deadly force in that siutation and another officer to—and when I say "policy" we know we're not talking about a written policy, but the way things operated in the department at that time, it allowed one

officer to use force, deadly force, and another one not to. A. Well, I'm not sure that that isn't the policy in everything in the Police Department today. I'm not sure that every officer would react, for example, to a fleeing burglar or fleeing murderer the same as another. They perceive the law, and, therefore, the policy to be, if I cannot shoot this person, if I cannot apprehend him, I have the right to use force, I have the right to use a firearm to apprehend him. That doesn't mean, in my opinion, that every policeman will shoot an escaping person, felon, if they can't apprehend him. There may be some people over there, I don't know who they are or anything else, but I believe some would say "I'm just not going to shoot that fellow. I believe we can catch him. I believe that he's catchable." And I believe that's true in this area. But in this area, I didn't want, if I could avoid it, anyone to have the decision in their mind that I can or can't. I wanted it eliminated as much as we could by policy from their decision-making process. I can't make a • • •

• • •

DEPOSITION OF E. WINSLOW CHAPMAN

• • •

[4] E. WINSLOW CHAPMAN,

The witness, being first duly sworn, deposed as follows, to-wit:

DIRECT EXAMINATION

BY MR. CALDWELL:

Q. You are E. Winslow Chapman? A. Yes, I am.

Q. And you're the Director of Police Services, is that the correct title? A. That's correct.

Q. Which position you've held since September, 1976? A. Correct.

Q. And prior to that time you were the Mayor's Executive Assistant? A. Correct.

Q. From 1 January, 1972 until September, 1976? A. Correct.

Q. And prior to being the Mayor's Executive Assistant what business were you in? A. I was self-employed, farming and real estate.

Q. Are you a native Memphian? A. Yes.

Q. You attended the public schools of Memphis? A. Yes.

• • •

[12] Q. Is that right? You had over thirteen hundred, fourteen hundred? A. I think they went over fourteen hundred at one point, didn't they, Art? I'm not sure. It went up at least in the range of fourteen hundred at one point.

Q. You were appointed Director in September of 1976 at about the time that the Civil Rights Commission was, maybe during the course of its investigation of Police Community Relations in Memphis? A. Directly before they came in here, like days before they came in.

Q. And you presented testimony to the Civil Rights Commission, is that correct? A. Yes.

Q. One of the big issues with which the Civil Rights Commission concerned itself and which you testified to, I believe, had to deal with the relationship of the Memphis Police Department with the black community? A. It was a major part of the issue.

Q. And you agreed at that time that it was a serious problem? A. I did.

Q. Had it been a serious problem as long as you had been observing the community and the situation? [13] A. My feeling was it had been a serious problem for years, yes.

Q. Now, from your perspective now what are the contours of that problem? What are the dimensions of it, and what causes it? How deep seated is it? How are you going to remedy it, and I'm not trying to suggest that you haven't been taking steps to remedy it. A. Well, I think it has been alleviated in large part at this time. And I think that a major part of that is in, first of all, the perspective of the black community as to what the police department is going to do about them, and secondly, the perspective of the police department itself as to where they fit relative to the black community. You know, its a discussion that we could go on for several hours if we really got into it.

Q. I mean is it a fair definition of the problem that historically the black community has not trusted the Memphis Police Department, or Memphis police officers in general? A. Oh, I think that's a fair and correct statement.

Q. And they also feel that they are subject to abuse by Memphis Police officers? A. Yes.

Q. And there's a basis in fact and history for that, is there not? [14] A. Yes. Yes.

Q. In fact it hasn't been eliminated to this day? A. Not completely, no.

Q. Last week you had a situation where you, well, I guess you forced an officer to resign for passing out racist literature on company time, so to speak? A. He chose to resign.

Q. But am I correct in that he was passing out racist literature to fellow officers? A. I don't know how to describe that literature to you, but yes, it was—It did have—it was basically racial as far as its overtone was concerned.

Q. According to the descriptions in the press, I don't know whether it was a pamphlet or a series of papers or

what, but it depicted blacks as still being in the ape age, or the ape stage of development? A. That basically was what it did, yes.

Q. All right. The Commercial Appeal's article on this incident also said that other white officers were observed reviewing this material and laughing. Is that a fact or did you find out? A. That was as related to us by the black officers who observed it.

Q. So there's still a chance you have racist police [15] officers? A. Oh, yes, I think that that's a definite possibility.

Q. And a police officer who would find fun in this sort of thing might also mistreat a black person, mightn't he? A. Well, I don't think that you could make that definite assumption, I really don't. I think that obviously the treatment of all citizens, black and white, by this department is not exactly all the time in every instance what I think it should be. On the other hand the improvement has been just tremendous over what it was a few years ago, and I think that this improvement is continuing.

Q. Well, I agree with that. I mean I agree with you that there has been improvement and it is in contrast to what it was a few years ago. A. I don't relate the passing out of that literature as necessarily being related to a tendency to abuse people. I think it was just a very immature, childish, inexcusable, but immature and childish thing.

Q. Well, someone who finds humor in this sort of bigotry at least has a potential not to treat people equally because of the color of their skin, would he not? Well, anyway, the fact that we agree there is a basis in fact for this— A. (Interposing) There's a basis in fact for the [16] distrust of the black community.

Q. And that would have been true in 1972? A. Absolutely.

Q. And 1974? A. Absolutely.

Q. And 1976? A. Yes.

Q. A part of that historical tension between the Memphis police officers and the black community is related to incidents of the use of deadly force? That's also been a part of the overall community relations problem, has it not? A. As far as the perception of some members of the black community, yes.

Q. Would it be fair to say that in 1972 a black person is likely to have feared contact with the Memphis police officers? A. It's possible, yes.

Q. And I saw an article a while back, I keep all kinds of clippings, but this is—you may recall this situation where the guy was standing on the corner and the police arrived and he started running and was shot at. It turned out that he was totally innocent of anything. He was just standing on the corner, or were you satisfied that he was— A. (Interposing) Well, no. I was not satisfied. I • • •

• • •

• • • [18] the person he shoots at is responsible for the crime. Use all reasonable means to capture a fleeing, dangerous felony suspect before using his weapon. Have a clear line of fire when he uses his weapon in order to prevent injury to innocent persons."

And then it says, "The Trial Board cleared him on the first two sections but found him guilty on the third," apparently because a pellet struck a house and could have injured an occupant. So he violated your deadly force policy at that time by not having a clear field of fire?

A. Right.

Q. Before he fired. All right. When you took over the Police Department in September of 1976 what was your first action with respect to modifications or changes in the deadly force procedure? Let me show you a

document which I believe is the last General Order on Deadly Force before this summer, and that's dated 5 February 1974?

(Passed to witness.)

A. Uh-huh.

Q. That was the policy in effect when you became Director in 1976? A. Right.

Q. Now, you made some changes over the time that you've been Director in the deadly force policies and procedures, [19] and reporting procedures and so forth? A. No, I don't think so. I think I've made changes in the reporting procedures. I think I have clarified, I hope, you know, sufficiently what the policy is, but as far as I'm concerned I changed nothing as far as this basic—well, I have taken certain standing rules unwritten, such as firing at juveniles, which I don't think you will find written anywhere, but it was a policy, unwritten, but nevertheless a policy of the department. My instructions when that 1979—

Q. (Interposing) Now, how did you know about this policy? Let me interrupt you a moment. How do you know it was a policy? A. Through staff discussions. Through staff discussions.

Q. How long do you think that had been a policy? A. I don't know. My instructions to Lieutenant Kenon were to take all the extant procedures, policies, written and unwritten, to come up with them, to discuss them with myself and the command staff, and then from that we gave him the instructions of how we wanted the new General Order written, with a further instruction that it was to be written in such a way that if at all possible there could be no question about what it meant, because I think that the problems that we had found in the policy was, you know, some question as to what—at times as to what the policy was, so [20] we wanted to make it as clear as possible. But I don't feel that I changed anything.

Q. The substance of the policy? A. No.

Q. All right. And in fact the—let me show you another document which is dated 16 July 1979, and this is the policy that resulted from your instructions to Lieutenant Kenon? A. Right. Right.

Q. Now, how did—when you arrived at this policy tell me who all was involved in formulating this policy in addition to—Lieutenant Clyde Kenon is your legal advisor, is that right? A. Right.

Q. And who else was involved? A. Oh, I would say for sure the entire Command Staff which I refer to as being Chief Inspector and above, probably some Inspectors and some Captains. What we do on a major—

Q. (Interposing) Let me interrupt you one second. How many people are involved in the Chief Inspector and above? A. Twelve.

Q. Twelve. A. But what we do on something of this sort, we'll tell the staff person what we want; that is my Command Staff will • • •

• • •

• • • [27] them into a film. I guess you're familiar with a "Shoot - Don't Shoot" film.

Q. Now, that's a— A. (Interposing) That's where an officer is shown a set of circumstances on a screen and he has a gun with blanks, and he had to make up his mind whether to shoot or not shoot.

Q. Did Sixty Minutes run a program on one of these? A. Yes. Yes. But we'll make our own.

Q. Did you have any kind of film prior to this Order that you— A. (Interposing) We have the standard "Shoot - Don't Shoot" film, but I don't like it because I I don't think it applies itself to what our problems are. It has some situations in there that are just totally removed from anything that we would encounter, but we

will require in the future, probably during this next in-service class, that the officer not only pass the P.P.C., which is the straight marksmanship course, he will also have to pass our "Shoot - Don't Shoot" course, which once again will have those situations which we, and that's the Command Staff and the Training Staff, perceive to be our most serious problems. It could be because it's a very, very serious shooting, or because it's one that continues to pop up and cause us problems.

• • •

• • • [29] the officer, and to effect arrest? A. Right. A fleeing felon.

Q. A fleeing felon situation. And as you know this case concerns the third category? A. Right. Well, I've got to be honest with you. I'm not familiar at all. I know nothing whatsoever about the case we're discussing. I was, you know, I don't have any historic knowledge of it, and I generally heard the Mayor discuss it, and that's the extent of my knowledge of it.

Q. Well, you know, it was an auto theft situation where some teenagers had— A. (Interposing) I've heard that discussed in his office.

Q. So you know that much about it. I mean I'm not going to get into the facts of this case with you. Now, what is the purpose of using deadly force to arrest somebody? Let's assume that it doesn't have any of the other two elements in it. There's no element of self-defense involved. There's no element of defending another citizen involved. A. You and I discussed that at length in this very room sometime back, but I'll reiterate.

Q. All right. A. We feel a dangerous felon is a person who by virtue of his actions and his temperament and his propensity is an [30] individual who, if allowed to escape from whatever crime you encounter him in, is

subject to cause danger, is subject to be in a situation which will be dangerous in the future.

Q. To either the police officer or to who? A. Well, to both the police officer and the citizens, primarily the citizens, but I think you'd have to say to both; that he is a potentially dangerous person, that by virtue of commiting one of these acts he has proved himself to represent a danger to the community, which the community I would hope would include both police and the citizens. It should. Therefore, if allowed to escape he represents a very clear future danger. That's the rationale.

Q. So the purpose is to— A. (Interposing) The purpose is to apprehend him.

Q. But when you use deadly force you're also risking his life? A. Yes.

Q. And it's not for what he's doing right then, but it's what he might do in the future, is that essentially what you're saying? A. No. I think you've got to take it in steps. We're saying that we're using deadly force, and we may use a lot of other methods with deadly force being the last resort to apprehend this person. And we're saying that the reason we [31] would go as far as deadly force is because if allowed to escape this person would represent a danger to the community in the future, and therefore we would do all of the things that we would do in some other circumstances; for instance, if it's someone who's a DWI and driving in a reckless manner, we would try to cut him off. We would try to call in help. We would do everything we could to stop him. We would not use deadly force.

In the case of a fleeing felon who we consider to be a basically dangerous individual, a person who by virtue of committing a felony has proved himself to be a basically dangerous person, we would go one step further, assuming all other means were exhausted and use deadly force

to apprehend him. Now, the use of deadly force relates to what he's done only that by doing whatever he's done he has placed himself in the category of being a dangerous felon, of having committed a felony and therefore being a dangerous person who has to be stopped with everything up to and including deadly force.

Q. All right. Now, some of the felonies on the list are inherently dangerous felonies? A. Yes.

Q. Burglary in the First or Second Degree? A. Right.

Q. But others may not be inherently dangerous felonies, [32] do you agree with that? A. We've discussed that, too, yes.

Q. And we've talked about Third Degree Burglary? A. Right.

Q. And how that frequently a crime is committed by juveniles, frequently unarmed, I'm not saying all the time but it does have a high degree of frequency that these people aren't armed. They're not breaking into somebody's house, they're breaking into a business establishment. A. Well, as I said to you previously, unfortunately, we don't have specialized burglars, and we don't have burglars who specialize in Third Degree burglaries only, nor can we say with any accuracy whatsoever that the fact that an individual is a juvenile does not—automatically makes him not a dangerous person. I think statistics and facts would definitely not bear that assumption out. So what we're saying is that a burglar, a person who would break into a building, we are not prepared to say that a person who is encountered escaping from a Third Degree Burglary is simply a Third Degree Burglar. We're saying he is a burglar, and that burglars are dangerous people. And this obviously could be debated, and you and I have debated it. But we're saying he's subject to commit a First Degree Burglary maybe

tomorrow night, maybe not, but the chances are that at least—and I [33] think I could run you through a series of situations. For example, the burglars who broke into Mrs. Dorris' home, Mrs. Jewel Dorris' home sexually assaulted her in unspeakable ways, left her tied spread-eagled to a bed for some forty-eight, fifty hours. She escaped with her life by the hardest. They were in fact guilty of Third Degree Burlaries before that event and were apprehended in the course of a Third Degree Burglary after that event. So I don't think you can categorize persons involved in Third Degree Burglaries as a non-dangerous person. They may not be.

Q. I agree. Now, what did you do with these people when you caught them? You didn't take them out and shoot them, you took them to a jail and charged them with a criminal offense— A. (Interposing) Yeah. Right. Hopefully we don't take anyone out and shoot them.

Q. Well, I agree that I'm not—I didn't mean to overstate my point. You couldn't just go through your records, your arrest records, or your conviction records and pick out an individual with a high degree of Third Degree burglaries on his card and go out and arrest him because he might commit another one tomorrow night, although the statistics are very good that he might? A. Right.

[34] Q. You couldn't go arrest him? You couldn't get an arrest warrant? A. No, I could not.

Q. On the basis of that information? A. No, I could not.

Q. But what you're telling me is that you shoot him for that purpose because if he gets away he might commit another one tomorrow night? Now, isn't that what you're saying? A. I'm saying we apprehend him and we authorize the use of deadly force to apprehend him.

Q. Unless he's thought to be a juvenile, now? A. Unless he's thought to be a juvenile. That is a policy which brings about considerable conversation because, once again, juveniles are increasingly subject to be dangerous people themselves.

Q. But if they're being dangerous in a way that the officer believes presents a threat to his life or the life of some other person— A. (Interposing) Right.

Q. (Continuing) —he's authorized to use deadly force, isn't he? A. Absolutely.

Q. But it's only that he's not allowed to use deadly—the officer is not allowed to use deadly force solely on the [35] basis of the fact that he's committed a crime? A. Solely on the basis that he's a fleeing felon.

Q. In one of these felony categories that's listed? A. Right.

Q. Do you think you ought to shoot auto theft suspects if there's no other way to apprehend them? A. Do I think so? Probably not but I have mixed emotions on that.

Q. How about embezzlers? A. No. Statistics would show you that embezzlers very seldom harm anyone in the course of embezzlement, and the reason I said I have mixed emotions on auto theft is because of the fleeing in an automobile representing a clear and inherent danger, and I—as I say, I'm saying "no", but I'm telling you I have a reservation about it. By the same respect I would tell you that I'm not sure in terms of, and I think we're talking about danger, in terms of how dangerous a DWI is, but I would say in the case of DWI or traffic or an auto theft, and they all three basically fit in the same category as far as danger is concerned, is that there is almost always another way to stop them.

Q. But these are—you're talking about people who are in automobiles who are fleeing? A. Right.

• • •

• • • [42] force because the man was an auto theft. He was using deadly force because according to him the man was trying to run over him. He was reprimanded, as I recall, for the way they treated the man once they took him into custody, not for using deadly force.

Q. I was just exploring a hypothetical, and I didn't even mean to mention this officer's name because I wasn't trying to get into the facts of his case, since I don't represent anybody involved in that.

I've lost my question now. All right. We were talking about the purpose behind using deadly force, and you're telling me that the basic purpose is to prevent him from getting away and committing another similar crime or a worse crime? A. Committing a dangerous act in the future.

Q. In the future. And this would be even though he hasn't committed a crime inherently dangerous to people at the time, at least so far as the police officer on the scene knows from all the facts that he observes? Even if this suspect—let's assume he's breaking out of a warehouse or a school at night, or something. That's a Third Degree burglary, he's guilty of a felony and he's tried and convicted. But you authorize the officer to use deadly force in those circumstances because statistically you think that a lot of people [43] in this category commit more violent crimes if they don't get apprehended? A. I think that that is not an inherently non-dangerous crime. Suppose he encountered a guard or an individual in that? The fact that the warehouse happened to be empty and therefore he encountered no one, and therefore no harm was done to anyone does not make him any less a dangerous person. The propensity to commit an act. Suppose that we caught someone burning down—arson is also on the thing, suppose we caught someone burning down a building which had no one in it, and it was a building

away from everything else. He would still be an arsonist, because the propensity to burn down buildings, the fact that that one building happened to be unoccupied, the propensity to do that makes him an inherently dangerous individual, and I think that is the issue, is that what is a dangerous felon? An embezzler is not a dangerous felon. He is a felon but not a dangerous felon. A burglar, and we don't—we don't specialize burglars in categories. Burglaries may be specialized, but burglars we don't feel are. A burglar is a dangerous felon.

Q. Although there are non-dangerous burglars? A. No, I don't think so. I think a person who would commit burglary, you know, is subject to—he is an inherently dangerous person by virtue of the fact that he commits [44] burglaries.

Q. I used to live in Parkway Village. I've never been ripped off as much in my whole life as I was during those two or three years I lived out there, but it was mostly kids. They broke into houses. They broke into—stole my tools.

MR. SHEA: This is off the record.

(Off the record comment.)

Q. (By Mr. Caldwell) There was never a situation where deadly force was considered. I mean if we caught these kids they went to Juvenile Court. We gave them a lawyer. We gave them all the due process in the world, and then they got put in the custody of their parents where they were to begin with, and that's all that happened to them. We don't kill them. But you're saying that police officers are authorized to kill them if they're escaping—not now because they're juveniles, but if they're adults he's authorized to kill them? A. Well, I think that you hit on a very important point there, "authorized to use deadly force." We rest our case in the judgment of police officer. A police officer is supposed to have judg-

ment. And I think the issue here is not that he is required to use deadly force in the case of an escaping burglar, but that he is authorized to do so. I think that you would find more cases of escaping burglars who in effect successfully escaped and who did not have deadly force used [45] against them. I think that if you restrict the officer from the use of that deadly force then you've got a problem.

Q. All right. Let's talk about that. Do you know what percentages of arrest are effectuated by the use of deadly force? A. Well, very few because you would find that deadly force is the exception rather than the rule. And as I say, statistics would easily bear you out that—just offhand, just a jump at a number, I'd say maybe one percent or less of all arrests involve the use of deadly force in any way.

MR. SHEA: Excuse me. Could you clarify what you mean by "the use of deadly force"? Is that unholstering your revolver or is that actually—

Q. (By Mr. Caldwell) (Interposing) Discharging the firearm is what I'm talking about. You know, we've got statistics in the Wylie case covering about a four year period, and I'd say that at least ninety percent of them the suspect escaped. Now, he might have been arrested later because of other information that he had. A. But what I'm saying to you—that's not the statistic I'm referring to. What I'm referring to, of all arrests made how many involve the use of deadly force, I would say it would be less than one percent, probably less than a half percent. I don't have that statistic, but I know [46] how many arrests we make, and if you want to even boil it down to arrests of felons I think you'd still find it less than—well, let's say you'd find it a minute percentage point.

Q. That's true. I think when we compile these statistics something like, you know, I don't know exactly, it was something like a hundred instances of the use of deadly force against property crime suspects during the same period of time fifteen thousand property crime arrests were made. A. I would say that.

Q. So we're talking about a very small percentage of arrest situations in which deadly force is even used. Now, my question is, let's say there is a hundred in a given period of time in which deadly force is actually used. Still a small percent, less than half of those actually result in the arrest of a suspect. In other words they miss more— A. (Interposing) You're saying in other words do we hit at what we shoot at? The chances are, you know, probably more likely, under the circumstances where deadly force is used, he will not hit. I agree with that.

Q. I mean if we just look through the incidences that get Coverage in the paper over the past six months, one or two of those the suspects were hit, but in other instances like this police officer who was involved in the auto theft [47] investigation, he didn't hit anybody. I mean that just happens more often than they hit somebody? A. Right.

Q. All right. So we're down to where—maybe we're down to a tenth of a percent now of arrests that are actually made by the use of deadly force? A. Yes.

Q. And a high percentage of those are made because the victim is killed or seriously wounded? A. Yes.

Q. Now, I'm just talking about the non-violent property crime suspects, or at least the unarmed property crime suspects.

MR. SHEA: Excuse me. When you say "unarmed", does the officer know that he is unarmed at the time the property crime is being—

Q. (Interposing) Well, these statistics are ones that Captain Coletta compiled for us and were separated into those in which he used it for self-defense and defense of others, and in those in which he just used it for arrest purposes. He wasn't using it because he thought the suspect was armed, and all those instances were unarmed. So you know, I'm not trying to get any general agreement on unarmed or non-violent or inherently not dangerous property crime suspects.

• • •

• • • [49] it would overwhelmingly pass that deadly force should continue to be used for all felons, and I don't think they would restrict it to the ones we have. That's just an opinion.

Q. Well, it would be a difficult referendum to conduct and have any meaning to it. If you gave them a fact situation like kids breaking into Snowden School or some public school and ask them if they thought the police officer ought to use deadly force with those kids that ran from the police—it would be a different response than if you asked them if they ought to shoot a fleeing murder suspect? A. I'm not so sure that you correctly interpret the feeling of the community, the black community and the white community in regard to kids who do something like that. I'm not sure we agree on that, but that's something we neither one of us will know. I think, once again, I reiterate that persons who commit burglaries have proved themselves to have a propensity to be dangerous and therefore they are dangerous felons, and therefore we allow the officers' prerogative to use deadly force. We do not require him to use deadly force, and he probably does not use it more often than he uses it, but he nevertheless has that right.

Q. Before you got off onto the referendum answer, we were talking about what a small percentage of ar-

rests are actually effected by using deadly force in the property crime, [50] —unarmed property crime suspect category. A. I would concede it as a very small percent.

Q. And I want to get back to this question because I want, I really want to press you on just what legitimate law enforcement objective is served by that policy. Now, it can't be capturing criminals because you don't capture many that way. A. Well, nevertheless that's what it is.

Q. That's it? Capturing criminals? A. Right.

Q. Chief Lux used to argue that it deterred other people from fleeing, the use of— A. (Interposing) I think in a degree it does deter them. I think that the absence of it would be whatever the negative of deter is, encourage, I suppose.

Q. And is that still a purpose of the— A. (Interposing) No. You just said it did. That's not the purpose of the policy. I'm just saying that I agree with that.

Q. I say Chief Lux argued that it did have a deterrent effect. A. And I would agree with you that it does, but I'm saying that's not the purpose of the policy.

Q. You would agree with Chief Lux? [51] A. Agree with—excuse me, agree with Chief Lux. I thought I had you on my side there.

Q. No. In fact I've never subscribed to that, that it deters people from commiting crimes by using deadly force against fleeing suspects. I always thought that was a hard way to—one time the department, I don't know if you're familiar with this, in 1969 Chief Lux issued the first Order prohibiting warning shots, and you still—your policy still incorporates that prohibition? A. Right.

Q. And he did that after some study indicated it just wasn't having any effect? A. Right.

Q. I think one police department reported that they thought it just made the suspects run faster. A. Well, I could give you a personal experience of that.

Q. Give me that. A. I was chasing a man through a field and somebody in the back of the crowd said "Halt" and shot up in the air and I was just about to catch him, and he ran off and left me. I was running just as fast as I could go.

Q. This was when you worked for the Sheriff's Department? A. Yes. I was within two steps of catching him and he [52] just ran off and left me.

Q. Now, suppose he'd shot at him and missed? A. I suspect that would have probably made him run.

Q. Had the same results? A. Yes.

Q. Chief Lux testified for us in the Wylie case, and of course, he's dead now, but he felt that there was—one of the biggest problems he had in curtailing the use of deadly force by police officers was what he called "peer pressure." You know, it seemed to be a sort of a macho kind of thing to use deadly force. Is that a problem in your judgment now? A. No.

Q. And that's because you have had more effective publication of the rules and regulations? A. I think so.

Q. Does this General Order—do the officers get reminded of that periodically at roll call? A. No, not at roll call, but they'll get a pretty extensive course on it each year during in-service training to include, as I say, the "Shoot - Don't Shoot" film.

Q. Would you be satisfied just to have the State law authorizing the shooting of fleeing felon suspects without any written orders of any kind? [53] A. I'm satisfied with our written orders. I wouldn't want to go back strictly to State law.

Q. Why? A. Well, I think State's law is too vague. I think that State law is not specifically spelled out and therefore represents a problem or a danger to the police officer that in a situation he might do something which

caused him to be liable or him to have a problem, and that's one of the reasons that we wanted it spelled out, I wanted it spelled out in just as fine a detail as possible. So, no, I think the State—let's face it, the State law is mainly, in regard to fleeing felons, is not in fact a law. It's a series of case Opinions, and therefore it's very, very complicated, and you've almost got to take it case by case to know what the State law is.

Q. But there aren't that many decisions? I think it's only four or five. A. No, but they're very complicated decisions, you know.

Q. Most of them arise in the criminal context, too, when a police officer is being charged with manslaughter or something? A. No. I think that the responsibility of carrying a weapon and using that weapon is awesome. It's an awesome responsibility, and therefore we should very closely regulate it, very closely monitor it, and insure that every officer [54] who is empowered to do thus is very clear under what circumstances. I think that's why I would be, you know, I would not wish to go away from the General Order.

Q. Are you familiar with the President's Commission on Law Enforcement and the Administration of Justice and the reports that were issued back in '67? A. Yes.

Q. One of them was called Task Force Report to Police? A. Right.

Q. And the other was called the Challenge of Crime in a Free Society? A. I have a copy of both.

Q. And both of those recommended that police departments should have detailed guidelines on the use of deadly force? A. Right.

Q. And found that the lack of such guidelines in police departments— A. (Interposing) Caused problems.

Q. Was a problem? A. Right.

Q. All right. Well, I understand the purpose now. The purpose of deadly force, as far as you're concerned in the category that we're talking about, that's non-self-defense or defense of others, is to capture the person because he • • •

• • •

• • • [60] that they've been a part of some changes. You see, many of these changes that we're talking about have been, if not directly, certainly indirectly by virtue of our discussions and their encouragement and whatever, many of them.

Q. Oh, I think you're doing an effective job. The people who are critical traditionally of the police department give you high marks for progress.

MR. CALDWELL: Can we take a short recess?

RECESS

Q. (By Mr. Caldwell) Director Chapman, I just have a couple more short questions which Mr. Arnold has called to my attention, some things I want to get kind of specific about, and we're not just using this as an opportunity to get to spend the day with you, even though we don't get to spend much time with you.

We talked about the fact that there was a basis in fact historically for the animosity, or whatever we want to call it between the black community and Memphis police officers? A. Right.

Q. We didn't talk about many examples of what, you know, what forms that basis, and I'm sure it's a very complex problem, but you were aware that in 1970 the N.A.A.C.P. had an Ad Hoc Committee of black elected representatives which held hearings on the police department? [61] A. No. I was not here.

Q. That Committee's report, you know, made a number of reported findings, one of which was that the most

common form of address between a Memphis police officer and a black person appeared to be "Nigger" or "Boy". In fact Mayor Chandler said in one of these depositions that we've taken from him that he thought, you know, he hoped this—this was, I guess the Wylie deposition back in '75, and he hoped in the future that the black community would come to the point where it wouldn't view the police officer as just, you know, "Hey, boy, come over here" kind of response, but, you know, as a friend. And I suppose that's your goal.

But those kinds of things are the things we're talking about which have given the relationship a basis in fact, you know, the "Hey, boy, come over here" kind of approach. A. Yes, although really I think that's an oversimplification. I think the relationship between this department and the black community is a direct reflection of the relationship between the white and black community here in Memphis. I think that the "Hey, boy" syndrome extended far beyond the Memphis Police Department. It maybe lasted there longer, but lasted there only because it was perceived by the department as being accepted by the majority of this [62] community. I would like to take credit for all the changes, but I think that the changes are in fact reflective of what we have at least convinced the police officers that this community expects of them and the fact that they belong to the community. I mean that literally, both black and white.

So I think that you could take those problems and work them into that context, but I think that that's an oversimplification of the real problem.

Q. The real problem is the community problem between the white and black communities? A. Yes.

Q. And of course, during most of the time we're talking about the police department was all white, or virtually all white? A. Certainly representative of the white majority.

Q. And it's still disproportionately white but you've made some fairly significant employment and promotional gains in the last few years, is that correct? A. Well, yes. But of course, and I suppose some people would argue this: I think that the real key is the perspective on the part of the individual police officer as to what his responsibilities are and his personal vices, prejudices, feelings may not enter into the performance of his duties professionally any more than the bias of an attorney, the [63] bias of any doctor can enter into his if they're going to be the professionals that they claim to be. I think that the individual police officer has at last come to the realization that he is in fact the servant of this entire community and that this department belongs to the entire community. And I think that these are the real keys, not the racial make-up of the department, although I think that the racial make-up of the department in retrospect was reflected in the original problems mentioned. I think that the racial make-up of the department is important, but I think that in terms of what you're talking about and those problems, I have had equal problems with the black officers in terms of the black officers trying to out red-neck the white officers, and that's a very poor way to put it, but I mean that's literally what we had. So what we need is a realization on the part of all officers, black, white, male or female, of what their role is, and of course, that's what we've tried to do.

Now, I'm not saying that we've completed that goal one hundred percent, and I don't think that we will over a period of years because I think attitude changes are slow in coming, but I think we're on the road, and I think that they do realize at this point. Whether they do it in practice or not, by golly they realize what they're supposed to do and they know, just as they found out the other day, they know [64] that when they are caught not

doing that, action—remedial action will be taken. So I don't know—I've talked around the bush, but I dislike the thing of saying the racial make-up of the department solves the problems.

Q. I find your answer acceptable, that the racial make-up of the department— A. (Interposing) It's a fact. It's a fact.

Q. (Continuing) —and what was going on in the community, and in the community law enforcement was used primarily as something for white people and black people were treated as second class citizens historically, is that correct? A. Yes, I think we could say that.

Q. Your answer sort of prompts another question on a sort of different level, but you talked about you thought now one of the most important things you were doing in terms of bringing officers into line with what you want them to be and what the community wants them to be is their perception of the Command Staff, and what their policies are, and how important that is, to communicate with the officer on the beat? A. Right.

Q. And this is also why policy should be written as opposed to word of mouth and unwritten sorts of policies? [65] A. Right.

Q. So that it will be clear that the people in charge of law enforcement have this as their policy and that you're supposed to be carrying out that policy, isn't that correct? A. Right.

Q. And when you talk about this superiority of written policies as opposed to word of mouth policies, it's essentially that kind of thing that we're talking about? A. Yes. The slipped con.

Q. The what? A. Slipped con. Word of mouth.

Q. You were talking about this unwritten policy, I don't know whether that was your word or mine, but your feeling was when you developed this policy last summer, this new General Order on deadly force, now as I understand you didn't develop this policy, it's sort of a combination of all of the previous policies? A. It's evolutionary.

Q. Evolutionary. But your understanding from the people you talked to was that it had always been sort of an unwritten policy that you shouldn't shoot at juveniles? A. It's not my impression. That is a fact that that was the general impression in this department. Once again, when you talk about an unwritten policy you can not say for [66] an absolute fact that every person in the department sees it or understands it that way, and I suspect that you could find as many variations of that part of it as you could any other, but there is no question—from a variety of sources that that is what it was supposed to be. Whether it was understood that way by everybody I couldn't say.

Q. Now, the sources you're talking about— A. (Interposing) We didn't come up with that as a revolutionary new thing. In other words, my instructions to Kenon were to take everything, written and unwritten, and to present it to us, and then for us to sort it out and say "We'll have this and not have that." Basically we wound up with the exact same thing except some portions were perhaps more minutely gone into than they had before, almost to the point of change. In my opinion they weren't changed. In someone else's opinion they might say they were changed, because I suspect you could find someone on the subject of juveniles that said, "Well, yeah, it wasn't the policy to shoot juveniles in this, that and the other situations, but other ones it was." But nevertheless, that's just a problem which you mentioned in terms of unwritten policy.

Q. The people you got this general impression from were your Command officers, people who had been around a long time? A. Command Staff plus Kenon and I don't—as I say. • • •

• • •

MEMPHIS DEADLY FORCE POLICY DATED FEBRUARY 5, 1974

MEMPHIS POLICE DEPARTMENT
123 Adams Avenue
Memphis, Tennessee 38103

GENERAL ORDER

Number: 5-74 Date: 5 February 1974

Subject: USE OF FIREARMS AND DEADLY FORCE

1. PURPOSE.

To define circumstances under which *DEADLY FORCE* and *NON-DEADLY FORCE* may be used to prevent the commission of an offense and to effect an arrest.

2. BACKGROUND

a. *Definitions.*

As used in this order, DEADLY FORCE means the discharge of a firearm; or the use of force by other means calculated to inflict serious bodily injury or death.

NON-DEADLY FORCE means the use of force by methods, including a night stick or similar weapon, not calculated nor intended to inflict serious bodily injury or death.

b. *Applicability.*

The procedures defined in this order apply to the use of firearms under the following circumstances:

(1) Situations involving the use of firearms by departmental personnel in the line of duty involving the prevention of an offense or apprehension of an offender whether or not death or a wounding occurs as a result.

(2) In any case involving the accidental or negligent discharge of firearms involving departmental personnel in the line of duty not covered under sub-paragraph (1) above.

3. ACTION.

a. *Non-deadly Force.*

An officer may use NON-DEADLY FORCE when it is necessary to:

(1) Effect an arrest;

(2) Prevent the escape from custody of a person who is reasonably suspect of having committed an offense; or to

(3) Defend one's self or another in cases not involving serious bodily injury or death.

b. *Deadly Force.*

DEADLY FORCE may be used in the following circumstances only after all other reasonable means to apprehend or otherwise prevent the offense have been exhausted:

(1) Self-Defense.

An officer may use DEADLY FORCE when it is in the defense of himself or another from serious bodily injury or death and the threat of serious bodily injury or death is real and immediate.

(2) Felonies Involving the Use or Threatened Use of Physical Force.

An officer may use DEADLY FORCE when the offense involves a felony and the suspect uses or attempts to use or threatens the use of physical force against any person.

(3) Other Felonies Where Deadly Force is Authorized.

After all reasonable means of preventing or apprehending a suspect have been exhausted, DEADLY FORCE is authorized in the following crimes.

(a) Kidnapping

(b) Murder in the 1st or 2nd degree

(c) Manslaughter

(d) Arson (Including the use of firebombs)

(e) Rape

(f) Assault and battery with intent to carnally know a child under 12 years of age

(g) Assault and battery with intent to commit rape

(h) Burglary in the 1st, 2nd, or 3rd degree

(i) Assault to commit murder in the 1st or 2nd degree

(j) Assault to commit voluntary manslaughter

(k) Armed and simple robbery

c. *Use of Deadly Force Prohibited.*

The use of DEADLY FORCE is prohibited when:

(1) Arresting a person for any misdemeanor offense; or

(2) Effecting an arrest of any person for escape from the commission of any misdemeanor offense.

d. *Use of Firearms Prohibited.*

(1) As warning shots;

(2) From any moving vehicle or to stop any fleeing vehicle, except in cases of self-defense or cases involving:

(a) Murder in the 1st or 2nd degree

(b) Rape

(c) Assault and battery with intent to carnally know a child under 12 years of age

(d) Armed or simple robbery

(3) In any case where an officer does not have a clear field of fire and cannot be reasonably certain that only the suspect will be hit and that the potential for harm to innocent persons or their property is minimal.

e. *Notification Procedures.*

(1) Once the situation is under control, any member who discharges a firearm in the line of duty will immediately report the fact to the Dispatcher who will have the cognizant watch or squad commander notified. The latter will inform the precinct or bureau commander of the event, without delay. As soon as practicable, the officer who fired a weapon will

submit a written narrative of the circumstances, via the chain of command, to the Chief of Police, with copies to the Senior Member of the Firearms Review Board and to the Commanding Officer of the Firing Range. In addition, Form P2100.149 shall be filled out and forwarded to the Firing Range.

(2) In any case resulting in death or wounding, the cognizant watch or squad commander, or his designated representative, will proceed to the scene and will relieve the officer(s) concerned pending completion of the inquiry that will be conducted by the Firearms Review Board. In addition, the Dispatcher will notify the Homicide Squad and the Internal Affairs Bureau as rapidly as possible. Preservation of the scene will be the responsibility of the senior commander present.

4. *SELF-CANCELLATION.*

This order shall remain in effect until its provisions have been incorporated into the department's Manual of Policies, Procedures and Rules and Regulations.

/s/ J. W. Hubbard
J. W. Hubbard

Distribution: A

MEMPHIS DEADLY FORCE POLICY
DATED JULY 16, 1979

MEMPHIS POLICE DEPARTMENT
123 Adams Avenue
Memphis, Tennessee 38103

GENERAL ORDER

NUMBER: 5-79 Date: 16 July 1979

SUBJECT: DEADLY FORCE POLICY

1. PURPOSE.

To establish uniform policies regarding the use of deadly force by members of this department and to establish procedures for the investigation and review of police shooting incidents. This order rescinds General Orders 18-76, 13-76, 13-77, 4-74, and 72-6 and Command Bulletin 9-77.

2. ACTION.

a. USE OF DEADLY FORCE

Definitions:

(1) DANGEROUS FELONY - A dangerous felony is any felony wherein the suspect has used, threatened to use, or attempted to use deadly force in the commission of a crime. Dangerous felonies include the following crimes:

(a) Kidnapping

(b) Murder in the 1st or 2nd degree

(c) Manslaughter

(d) Arson

(e) Criminal Sexual Assault, 1st, 2nd, or 3rd degree (Rape and Attempt Rape)

(f) Aggravated Assault

(g) Robbery

(h) Burglary, 1st, 2nd, or 3rd degree

(i) Any attempt to commit the above crimes.

(2) DEADLY FORCE - That amount of force that is sufficient to, intended to, or may be reasonably expected to inflict serious bodily injury and/or death. This includes the discharge of any firearm, at, near, or in the direction of any individual.

(3) JUVENILE - Any person under the age of eighteen (18) years.

(4) REASONABLE BELIEF - Such belief as would appear reasonable to the ordinary and prudent police officer of similar experience in like circumstances. Such belief is not reasonable if the officer is reckless or negligent in having such belief or in acquiring or failing to acquire any knowledge or belief of fact or of law which is material to the justifiability of his use of force.

(5) EXHAUSTION OF ALL OTHER REASONABLE MEANS - All other reasonable means have been exhausted when an officer has tried to control conflict by using all alternate methods other than deadly force; however, all other reasonable means may be considered to have been exhausted when an officer analyzes a set of circumstances and honestly and

reasonably concludes that any other means will be ineffective, useless, or hazardous to the officer or some innocent third party. In order to qualify as having exhausted all other reasonable means, the officer must be able to show that his use of deadly force was immediately necessary. The officer must also have communicated his identity and purpose to the suspect, unless these facts are already known by the suspect or cannot reasonably be made known to the suspect under the circumstances. In deciding whether the use of deadly force is reasonably necessary, the officer must consider whether later action on his part could eliminate the immediate need for deadly force.

The law in the State of Tennessee which regulates whether or not an officer has exhausted all other reasonable means is best illustrated by *Rewsey v. State*, 70 Tenn. 720 (1879). In this case the Tennessee Supreme Court examined a situation wherein a constable and a guard were transporting a prisoner to the Jefferson County Jail when the prisoner broke and ran in an attempt to escape. Neither of the officers ran after the prisoner. Instead, after commanding the prisoner three (3) times to halt without being obeyed, the constable fired two (2) shots at the prisoner. The constable was convicted of manslaughter and the Supreme Court upheld this conviction and laid down this rule for the State of Tennessee:

> An officer having a prisoner in custody who attempts escape will be excused for

killing him if he cannot be otherwise retaken, but if he can be otherwise retaken in any case without resort to such harsh measures, it will be at least manslaughter to kill him. The officer doubtless acted under the belief that erroneously prevails as to the rights of a public officer, that is, that he may lawfully kill a prisoner if he fails to obey his command to halt. This is a very erroneous and very fatal doctrine and must be corrected. Officers should understand that it is their duty to use such means to secure their prisoners as will enable them to hold them in custody without resorting to the use of firearms or dangerous weapons and that they will not be excused for taking life in any case, where, with diligence and caution, the prisoner could otherwise be taken.

This earlier Tennessee law has since been applied in many other cases involving the use of deadly force by police officers and is equally applicable to situations where an attempt is being made to apprehend a fleeing felon. The Tennessee Supreme Court in *Scarbrough v. State*, 76 S. W. 2d 106, (1934), specifically applied the above rule of law to cases involving fleeing felons. The court said:

> The law does not clothe an officer with authority to arbitrarily judge the necessity of killing, and such a course must be a last resort; and whether or not there was a necessity for killing, and the reasonableness of the grounds upon which the officer acted are questions of fact for a jury. Killing in flight is excusable only when it is shown that the felon cannot be ultimately taken by less drastic means.

b. Deadly force may be used in the following circumstances after all other reasonable means of apprehension or prevention have been exhausted:

(1) In self-defense where the officer has been attacked with deadly force or is being threatened with the use of deadly force.

(2) In defense of others where a third party has been attacked with deadly force or is being threatened with the use of deadly force or is in danger of serious bodily injury or death during the actual commission of a crime against his person.

(3) To prevent the commission of a dangerous felony in progress.

(4) To apprehend a suspect fleeing from the commission of a dangerous felony when an officer has witnessed the offense or has sufficient information to know as a virtual certainty that the suspect committed the offense.

(5) To kill an animal which poses a direct threat to the safety of the officer or other persons. However, the Ordnance Section should be called to handle such a matter unless the danger is immediate.

c. USE OF DEADLY FORCE PROHIBITED

The use of deadly force is prohibited in the following circumstances:

(1) To apprehend or arrest a person for a misdemeanor offense.

(2) To effect the arrest of any person for escape from the commission of any misdemeanor offense.

(3) As warning shots.

(4) To apprehend or arrest a person known to be or believed to be a juvenile unless the use of deadly force is immediately necessary in the defense of the officer's life or of another person's life when all other reasonable means have been exhausted. The officer's knowledge or belief of a person's age may be based upon factors such as the officer's previous knowledge of the person, his observations of the person's appearance, or upon reliable information given to him by other persons.

(5) To apprehend or arrest a person fleeing from a felony which is not a dangerous felony. This includes felonies such as auto theft, larceny, embezzlement, fraud, burglary of an auto, or any other felony which does not involve the use of deadly force, attempted use of deadly force, or threatened use of deadly force.

(6) From or at any moving vehicle except in a case where a dangerous felony has been committed in the officer's presence and the officer has determined that there is a much

greater threat to innocent lives by not using deadly force. In making this determination, the officer must consider the consequences of stray shots endangering innocent parties and must consider the consequences of the vehicle going out of control at a high rate of speed. Officers should be extremely cautious in using deadly force in self-defense when the deadly force used by the other person is an automobile, and the other person is trying to get away. The suspect's intentions are usually ambiguous, and the officer can usually escape harm at least as well by evading the vehicle as he can be standing his ground and firing at the oncoming vehicle. An officer almost never has a safe, effective shot at a moving vehicle. This is particularly true when an officer is involved in a high speed chase and is shooting from a moving vehicle.

(7) In any other case where the officer does not have a clear field of fire and cannot be virtually certain that only the suspect will be hit and that the potential for harm to innocent persons is minimum.

d. NOTIFICATION PROCEDURES WHEN WEAPONS ARE FIRED

When any officer of the Memphis Police Department discharges any firearm, whether on duty or off duty, the officer will immediately report the incident to the dispatcher who will have the cognizant Watch or Squad Commander notified. This Commander will proceed to the scene of the shooting and will begin an immediate investigation

and notify the precinct or bureau commander of the incident. The Commander will prepare a Supervisor's Shooting Incident Report (Attachment 1), and will also have the officer prepare a Firearms Use Report (Form-2100.148, Attachment 2). The Commander will also request a Crime Scene Squad unit to process the scene if necessary. The Commander on the scene may also request investigative assistance from the Investigative Services Division if said Commander feels that it is necessary.

In all shooting incidents where a suspect, other officer, or other citizen is wounded or killed, the Watch or Squad Commander will request that both Crime Scene and the Investigative Services Division conduct an on-the-scene investigation. The Commander in such cases is to immediately relieve the involved officer of duty pending the completion of the preliminary investigation. The Commander will notify the on duty or on call Staff Commander, and a decision will be made as to the necessity for notifying the Police Legal Advisor and the Shelby County Attorney General's Office for additional investigation.

6. REVIEW PROCEDURES

All reports, including the Firearms Use Report, Supervisor's Shooting Incident report, Crime Scene report, and General Investigation Squad report, copies of arrest tickets, offense reports, and memos will be immediately forwarded directly to the Deputy Director of Operations, prior to the end of the reporting officer's tour of duty.

Upon reviewing all initial reports, the Deputy Director of Operations will take the following action:

(1) Determine that no additional administrative investigation is required and either notify the officer by letter that no action is to be taken or issue a statement of charges using established disciplinary procedures.

(2) Determine that additional administrative investigation is required and assign this investigation to the Internal Affairs Bureau.

After the completion of the Internal Affairs investigation, all file material will be returned to the Deputy Director of Operations. The Deputy Director of Operations shall take one of the following actions:

(1) Notify the officer by letter that no action is to be taken; or

(2) Submit the investigative file to the Police Legal Advisor for review by the Attorney General's Office and/or the Shelby County Grand Jury.

(3) Issue a statement of charges using the established disciplinary procedures and/or schedule the case to be presented to the Trial Board for a hearing.

3. This bulletin will remain in effect until revoked or superceded by competent authority.

/s/ J. D. Holt
J. D. Holt
Deputy Director of
Operations

Distribution - A

AMICUS CURIAE

BRIEF

MOTION FILED
AUG 9 1984

Nos. 83-1035 83-1070

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE STATE OF TENNESSEE,

Appellant,

v.

CLEAMTEE GARNER, as Father and next of kin of EDWARD EUGENE GARNER, a Deceased Minor,

Appellee.

MEMPHIS POLICE DEPARTMENT, CITY OF MEMPHIS, TENNESSEE,

Petitioners,

v.

CLEAMTEE GARNER, as Father and next of kin of EDWARD EUGENE GARNER, a Deceased Minor,

Respondent.

ON APPEAL FROM AND ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE POLICE FOUNDATION, JOINED BY NINE NATIONAL and INTERNATIONAL ASSOCIATIONS OF POLICE AND CRIMINAL JUSTICE PROFESSIONALS, THE CHIEFS OF POLICE ASSOCIATIONS OF TWO STATES, and THIRTY-ONE LAW ENFORCEMENT CHIEF EXECUTIVES, AS AMICI CURIAE IN SUPPORT OF THE RESPONDENT-APPELLEE

(Attorneys' Names on Reverse of Cover)

BEST AVAILABLE COPY

Of Counsel
Robert Kasanof, Esq.
787 Third Avenue
New York, New York 10017

William Josephson, Esq.*
Fried, Frank, Harris,
Shriver & Jacobson
(A partnership which includes
professional corporations)
One New York Plaza
New York, New York 10004
(212) 820-8220

Philip Lacovara, Esq.
Hughes, Hubbard & Reed
1201 Pennsylvania Ave, N.W.
Washington, D.C. 20004

Margaret Bush Wilson, Esq.
Wilson, Smith & Seymour
4054 Lindell Boulevard
Suite 100
St. Louis, Missouri 63108

*Counsel of Record

Nos. 83-1035
83-1070

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

THE STATE OF TENNESSEE,

APPELLANT,

v.

CLEAMTEE GARNER, AS FATHER AND NEXT OF KIN OF EDWARD EUGENE GARNER, A DECEASED MINOR,

APPELLEE.

MEMPHIS POLICE DEPARTMENT,
CITY OF MEMPHIS, TENNESSEE,

PETITIONERS,

v.

CLEAMTEE GARNER, AS FATHER AND NEXT OF KIN OF EDWARD EUGENE GARNER, A DECEASED MINOR,

RESPONDENT.

ON APPEAL FROM AND ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Police Foundation, nine national and international associations of police and criminal justice professionals, the chiefs of police associations of two states and thirty-one law enforcement chief-executives hereby move this Court for leave to file the accompanying brief amici curiae.

The interest of amici is presented in the accompanying brief (infra at 1-10) in detail. Each is an organization or individual police chief executive dedicated to the effectiveness of the police and the protection of the basic rights of citizens. As such, the amici are uniquely equipped to provide the Court with both factual information and policy perspectives that bear on the constitutional issues raised in this case.

More specifically, the issue in this case is the constitutionality of the Tennessee statute, Tenn. Code Ann. § 40-808 (1975) permitting police officers to "use all the necessary means to effect the arrest" of fleeing non-violent felony suspects. Garner v. Memphis Police Department, 710 F.2d 240, 241 (6th Cir. 1983). Through long personal and professional experience, amici have particularized knowledge of the law enforcement considerations which arise in connection with deadly force laws, such as the Tennessee statute. By means of this brief, they seek to bring this knowledge to the attention of the Court.

Counsel for the appellant, the State of Tennessee, and for the respondent-appellee, Garner, have consented to the filing of this brief and their letters of consent are attached. Counsel for the petitioner, Memphis Police Department, City of Memphis, Tennessee, has not responded to the request of counsel for amici for such consent.

Respectfully submitted,

/s/ William Josephson

William Josephson, Esq.
Counsel of Record

Fried, Frank, Harris,
Shriver & Jacobson
(A Partnership which
includes Professional
Corporations)

One New York Plaza
New York, New York 10004

(202) 820-8220

Attorneys for Amici Curiae

August 6, 1984

ENCLOSURE

State of Tennessee
Office of the Attorney
General

450 James Robertson
Parkway
Nashville, Tennessee
37219 5025

July 17, 1984

Mr. William Josephson
Fried, Frank, Harris, Shriver
& Jacobson
One New York Plaza
New York, NY 10004

Re: Consent to Filing Amicus Curiae

Dear Mr. Josephson:

This is in response to your letter dated June 27, 1984, requesting our consent to your filing an amicus curiae brief in the case of State of Tennessee v. Garner, No. 83-1035 now pending in the Supreme Court of the United States. As Attorney General of Tennessee, I hereby give such consent.

Sincerely,

/s/ W.J. Michael Cody

W.J. Michael Cody
Attorney General
& Reporter

August 1, 1984

99 Hudson Street
New York, N.Y. 10013
(212) 219-1900

William Josephson
Fried, Frank, Harris, Shriver
& Jacobson
One New York Plaza
New York, New York 10004

Re: Tennessee v. Garner
No. 83-1035
Memphis Police Department v. Garner
No. 83-1070

Dear Mr. Josephson:

This is to inform you that respondent-appellee, Cleantee Garner, consents to the filing of an amicus brief on behalf of the Police Foundation, et al., in the above noted case.

Sincerely,

/s/ Steven L. Winter

Steven L. Winter

cc: Walter L. Bailey, Jr.
Henry L. Klein
Jerry Smith
David E. Sirendeum

Nos. 83-1035
83-1070

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

THE STATE OF TENNESSEE,
APPELLANT,

v.

CLEAMTEE GARNER, AS FATHER AND NEXT OF KIN OF EDWARD EUGENE GARNER, A DECEASED MINOR,
APPELLEE.

MEMPHIS POLICE DEPARTMENT,
CITY OF MEMPHIS, TENNESSEE,
PETITIONERS,

v.

CLEAMTEE GARNER, AS FATHER AND NEXT OF KIN OF EDWARD EUGENE GARNER, A DECEASED MINOR,
RESPONDENT.

ON APPEAL FROM AND ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE POLICE FOUNDATION, JOINED BY NINE NATIONAL and INTERNATIONAL ASSOCIATIONS OF POLICE AND CRIMINAL JUSTICE PROFESSIONALS, THE CHIEFS OF POLICE ASSOCIATIONS OF TWO STATES, AND THIRTY-ONE LAW ENFORCEMENT CHIEF EXECUTIVES, AS AMICI CURIAE IN SUPPORT OF THE RESPONDENT-APPELLEE

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Interest of Amici	1
Summary of Argument	12
Statement of the Case	12
ARGUMENT	14
I. Laws that authorize the police to employ deadly force to apprehend all fleeing felony suspects do not contribute to the ability of the police to fight crime or to protect themselves	15
II. Affirmance will be consistent with most police department policies and practices and will not unduly intrude on criminal law enforcement	27
III. Laws that authorize police use of deadly force to apprehend all fleeing felony suspects fail adequately to guide police officer discretion	40
Conclusion	47

TABLE OF AUTHORITIES

CASES

	Page
Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971)	48
Chimel v. California, 395 U.S. 752 (1969)	38
Delaware v. Prouse, 440 U.S. 648 (1979)	38
Furman v. Georgia, 408 U.S. 238 (1972)	41
Garner v. Memphis Police Department, 710 F.2d 240 (6th Cir. 1983)	14, 28
Katz v. United States, 389 U.S. 347 (1967)	38
Kolender v. Lawson, 461 U.S. 352 (1983)	39
Mapp v. Ohio, 367 U.S. 643 (1961)	38
Payton v. New York, 445 U.S. 573 (1980)	38
Rochin v. California, 342 U.S. 165 (1952)	38
Sibron v. New York, 392 U.S. 40 (1968)	38
Warner v. Detroit, 113 Mich. App. 747, 318 N.W.2d 625 (1982), appeal denied, 418 Mich. 906, 342 N.W.2d 520 (1984)	29
Wong Sun v. United States, 371 U.S. 471 (1963)	38

UNITED STATES CONSTITUTION

	Page
Amendment IV	13
Amendment VIII	13
Amendment XIV	13

STATUTES

	Page
42 U.S.C. § 1981	13
42 U.S.C. § 1983	13
42 U.S.C. § 1985	13
42 U.S.C. § 1986	13
42 U.S.C. § 1988	13
Tenn. Code Ann. § 40-808 (1975)	13

OTHER AUTHORITIES

	Page
M. Blumberg, The Use of Deadly Firearms by Police Officers: The Impact of Individuals, Communities, and Race (Ph.D. Dissertation, State University of New York, Albany Sch. of Crim. Justice, Dec. 14, 1982)	36
Brown, Use of Deadly Force by Police Officers: Training Implications, 12 J. Pol. Sci. & Admin. 133 (1984)	45
A. Cohen, I've Killed That Man 10,000 Times, 3 Police 17 (1980)	23

OTHER AUTHORITIES

	Page
J. Fyfe, Administrative Interventions on Police Shooting Discretion: An Empirical Examination, 7 J. Crim. Just. 309 (1979)	20
J. Fyfe, Observations on Police Deadly Force, 27 Crim. & Delinq. 376 (1981)	37
C. Gain, Discharge of Firearms Policy: Effecting Justice Through Administrative Regulation -- A Position Paper (Report released December 23, 1971 by Oakland Police Chief Charles Gain in explanation of a change in departmental deadly force policy), cited in W. A. Geller & K.J. Karales, Split-Second Decisions: Shootings Of & By Chicago Police (1981)	17-19
W.A. Geller, K.J. Karales, Split-Second Decisions: Shootings Of & By Chicago Police (Chicago Law Enforcement Study Group 1981)	35
G. Hayden, Police Discretion in the Use of Deadly Force: An Empirical Study of Information Usage in Deadly Force Decision Making (1979) (unpublished paper available at the University of New Haven), cited in L. Sherman, Executon Without Trial: Police Homicide and the Constitution, 33 Vand. L. Rev. at 95 n.150 (1980)	42-43

OTHER AUTHORITIES

	Page
J. Klenoski, Administrative Policy Statements: Deadly Force I (Delaware Police Department, May 21, 1981)	25
K. Matulia, A Balance of forces: A Report of the International Association of Chiefs of Police (National Institute of Justice/U.S. Department of Justice 1982)	29, 33, 34
Memphis Police Department, Training Academy, General Order Number 95-79, Deadly Force Policy (July 16, 1979), Jt. App. at 45, cited in J. Fyfe, Blind Justice: Police Shootings in Memphis, 73 J. of Crim. L. & Crim. 722 (1982)	35
M. Meyer, Police Shootings at Minorities: The Case of Los Angeles, 52 Annals 98 (1980)	35
C. Milton, J. Halleck, J. Lardner, G. Abrecht, Police Use of Deadly Force, (Police Foundation 1977)	2
Model Penal Code § 3.07(2)(b) (Proposed Official Draft 1962)	30
National Organization of Black Law Enforcement Executives, "Stop - Or I'll Shoot;" The Use of Deadly Force by Law Enforcement Officers (1982)	5
Police Foundation, Readings on Police Use of Deadly Force (Fyfe ed. 1982)	2

OTHER AUTHORITIES

	Page
President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: The Police (1967).....	21, 22, 30
Program Commission on Accreditation for Law Enforcement Agencies, Inc., Standards For Law Enforcement Agencies The Standards Manual of the Law Enforcement Agency Accreditation (Aug. 1983).....	31-32
Report of the National Advisory Commission on Civil Disorders (Bantam Books, 1968).....	22
L. Sherman, Reducing Police Gun Use, in M. Punch, Control in the Police Organization 98 (Atlanta 1983).....	20
Staff Report to the Michigan Civil Rights Commission (May 18, 1981).....	29
C. Uchida, L. Sherman, J. Fyfe, Police Shootings and the Prosecutor in Los Angeles County: An Evaluation of Operation Rollout (Police Foundation 1981).....	2
G. Uelman, Varieties of Police Policy: A Study of Police Policy Regarding the Use of Deadly Force in Los Angeles County, 6 Loy. L.A. L. Rev. 1 (1973) cited in U.S. Department of Justice, A Community Concern: Police Use of Deadly Force (1979).....	40

INTEREST OF AMICI

The Police Foundation is a private, non-profit organization established by the Ford Foundation in 1970 with a mandate to improve the quality of American policing. It has trained police executives and managers throughout the United States and abroad, and has conducted and published more than 50 research studies and experiments involving virtually every aspect of police policy and operations.

The Police Foundation's research on police use of deadly force has resulted in publication of several articles in

professional periodicals and in three books and monographs. Readings on Police Use of Deadly Force (Fyfe ed. 1982); C. Milton, J. Halleck, J. Lardner, G. Abrecht, Police Use of Deadly Force (1977); C. Uchida, L. Sherman, J. Fyfe, Police Shootings and the Prosecutor in Los Angeles County: An Evaluation of Operation Rollout (1981). The Police Foundation has also served as a consultant and technical advisor to the National Association for the Advancement of Colored People (NAACP) on a United States Department of Justice funded project with respect to police deadly force policies and practices (Office of Community Anti-Crime, Grant No. 80-TA-AX-0004). In addition, the Police Foundation is presently engaged in a study of police use of deadly force in New York City and Philadelphia.

The Police Executive Research Forum (PERF) is a District of Columbia non-profit corporation whose membership consists of police chiefs from the United States and Canada who serve jurisdictions with populations over 100,000. Eighty police chiefs are now general members, and their departments include approximately 20 percent of all American police personnel. PERF conducts and publishes research responsive to the needs of its membership and the citizens they serve. It serves as a center for the collection and dissemination of information useful in improving police effectiveness, and was a co-author of the standards on the use of deadly force adopted by the Commission on Accreditation for Law Enforcement Agencies (infra at 30-32).

The Police Management Association is a non-profit membership organization of 400 police managers and executives from

the United States and ten other countries. PMA was incorporated in the District of Columbia in 1980, and is dedicated to upgrading police management, professionalizing police at all levels, and assisting police to protect the lives, rights, and property of all citizens.

The National Organization of Black Law Enforcement Executives (Noble) is a non-profit organization of 1,000 professional command-level law enforcement officials representing all elements of federal, state, and local law enforcement. It is dedicated to improving the quality of criminal justice and police services for all citizens throughout the United States.

NOBLE unanimously adopted a resolution in 1980 advocating limiting police use of deadly force to the defense of an officer's life or that of another person. Research in this area by NOBLE

has resulted in the publication of a monograph, "Stop - Or I'll Shoot;" The Use of Deadly Force by Law Enforcement Officers (1982). NOBLE has been a co-author of the standards on the use of deadly force adopted by the Commission on Accreditation (infra at 30-32) and has provided technical assistance to the NAACP as well as a number of police agencies nationwide.

The Academy Of Criminal Justice Sciences (ACJS) is a non-profit membership organization incorporated in Nevada in 1972. Its membership includes approximately 1,400 criminal justice educators and practitioners, representing all 50 states. The prime purpose of ACJS is to foster excellence in education and research in criminal justice.

The International Law Enforcement Instructors Agency (ILEIA) is a membership organization founded in Massachusetts in

1976. Its membership includes 850 instructors in academia, police departments, police academies, state training councils, and allied institutions. ILEIA is dedicated to the improvement of criminal justice and related training and education.

The International Law Enforcement Stress Association (ILESA) is a non-profit membership organization incorporated in Massachusetts in 1978. Its membership includes 1,200 officials from local, state, and federal law enforcement agencies, as well as physicians, nurses, and social workers. ILESA is dedicated to reducing stress among law enforcement professionals in order to instill a more professional law enforcement ethic.

The National Association Of Police Planners (NAOPP) is a non-profit membership organization incorporated in Missouri in 1982. Its membership

inlcudes 240 federal, state, and local law enforcement planners in the United States and abroad. NAOPP is dedicated to the continuing effectiveness, improvement and professionalization of law enforcement.

The National Black Police Association (NBPA) is a non-profit membership organization of approximately 15,000 officials in federal, state, and local law enforcement throughout the United States. NBPA is dedicated to improving law enforcement effectiveness, and to protecting the lives, rights, and property of all citizens.

The Reserve L. / Officers Association of America (RLAOA) is a non-profit membership organization founded in 1969. Its membership includes reserve deputy sheriffs, auxiliary police, reserve deputy constables, police reserves, chiefs of police, sheriffs, constables, and law enforcement officers from 2,500 cities in

49 states. RLAOA is dedicated to increasing law enforcement professionalism through training, education, disseminating information, improving police-community relations, and eliminating use of unnecessary force.

The Kentucky Association Of Chiefs Of Police and the Utah Chiefs Of Police Association are non-profit membership organizations representing police chief executives in their respective states. All are dedicated to the continuing improvement and professionalization of policing, and to protecting the lives, rights, and property of the citizens they serve.

The following are police chief executives who join in this brief as individuals:

William C. Banner
Chief of Police
Corpus Christi, Tex.

Cornelius J. Behan
Chief of Police
Baltimore, County Md.

Keith R. Bergstrom
Chief of Police
Oak Park, Ill.

Anthony V. Bouza
Chief of Police
Minneapolis, Minn.

Robert V. Bradshaw
Chief of Police
Reno, Nev.

David Cameron
Chief of Police
Moscow, Idaho

Thomas E. Coogan
Chief of Police
Denver, Colo.

David C. Couper
Chief of Police
Madison, Wis.

Bernard D. Crooke
Chief of Police
Montgomery County, Md.

Raymond C. Davis
Chief of Police
Santa Ana, Cal.

John F. Duffy
Sheriff
San Diego County, Cal.

Reuben M. Greenberg
Chief of Police
Charleston, S.C.

Donald G. Hanna
Chief of Police
Champaign, Ill.

Charles Johnston
Chief of Police
Lakewood, Colo.

Richard A. King
Deputy County
Executive for
Public Safety
Fairfax County, Va.

William B. Kolender
Chief of Police
San Diego, Cal.

Schuyler M. Meyer, III
Chief of Police
Pompano Beach, Fla.

George Napper
Director of
Public Safety
Atlanta, Ga.

Jerry Neal
Chief of Police
Amarillo, Tex.

Thomas J. Nichols
Chief of Police
Lubbock, Tex.

John P. O'Brien
Sheriff
Genesee County, Mich.

Charles M. Rodriguez
Chief of Police
San Antonio, Tex.

Daryl Stephens
Chief of Police
Newport News, Va.

William K. Stover
Chief of Police
Arlington County, Va.

Charles T. Strobel
Director of Public
Safety
Alexandria, Va.

John L. Tagert
Chief of Police
Colorado Springs, Colo.

Melvin L. Tucker
Chief of Police
Tallahassee, Fla.

Robert C. Wadman
Chief of Police
Omaha, Neb.

Robert Wasserman
Chief of Police
Fremont, Cal.

Gerald L. Williams
Chief of Police
Arvada, Colo.

Hubert Williams
Police Director
Newark, New Jersey

All amici wish to improve the effectiveness of the police and to safeguard the basic rights of citizens. The amici are uniquely equipped to provide the Court with both factual information and policy perspectives that bear on the constitutional issues raised in this case.

SUMMARY OF ARGUMENT

After extensive research and consideration, amici have concluded that laws permitting police officers to use deadly force to apprehend unarmed, non-violent fleeing felony suspects actually do not protect citizens or law enforcement officers, do not deter crime or alleviate problems caused by crime, and do not improve the crime-fighting ability of law enforcement agencies. Thus, arguments based on these factors would not justify use of deadly force against fleeing non-violent felony suspects. Moreover, we have concluded that laws permitting use of deadly force in those circumstances are responsible for unnecessary loss of life, for friction between police and the communities they serve resulting in less effective law enforcement, and for an undue burden upon police officers who must make and live with the consequences of hasty life-or-death decisions.

STATEMENT OF THE CASE

This case involves the fatal shooting of Edward Eugene Garner by a Memphis, Tennessee police officer. At the time he was shot, Garner was fifteen years old, stood five feet four inches tall, weighed between 85 and 100 pounds, and was fleeing from the scene of a reported burglary. The police officer who shot Garner has testified that, while approaching the unoccupied house that was the scene of the reported crime, he heard a screen door slam and saw a figure running into the rear yard. In a subsequent search of the rear yard, he saw Garner stooping next to a six-foot tall cyclone fence at the rear of the yard. The officer shouted "halt." After pausing momentarily, Garner ran and sprang to the top of the fence. The officer, who correctly believed Garner to be unarmed, then fired his revolver, striking Garner in the right side of the

head. Garner fell, draped over the top of the fence, and died later that night at a hospital. It was later determined that he had broken into the house and had taken a ring and a wallet containing two five dollar bills. The officer testified that he fired because he believed that the boy would otherwise elude capture and because he had been trained that it was proper under Tennessee law to shoot fleeing felony suspects in such situations.

A suit was brought against the City of Memphis by Garner's father under authority of 42 U.S.C. §§ 1981, 1983, 1985, 1986 and 1988 (1981) to recover damages for wrongful death caused by claimed violations of the Fourth, Eighth, and Fourteenth Amendments to the Constitution. Reversing the District Court for the Western District of Tennessee, the Court of Appeals for the Sixth Circuit held that the Tennessee statute, TENN. CODE ANN. § 40-808 (1975),

permitting police officers to "use all the necessary means to effect the arrest" of fleeing non-violent felony suspects, violated the Fourth Amendment and the due process clause of the Fourteenth Amendment. Garner v. Memphis Police Department, 710 F.2d 240, 241 (6th Cir. 1983). On March 19, 1984, this Court noted probable jurisdiction of the appeal by the intervening State of Tennessee in number 83-1035 and granted the petition for certiorari of the Memphis Police Department and City in number 83-1070.

ARGUMENT

Appellant argues that the Court of Appeals judgment should be reversed because "the State retains compelling interests in the apprehension of criminals which can only be served through the truly effective power of arrest." Brief for Appellant at 7 (emphasis added). Petitioners similarly argue that "the Court of Appeals either

ignored or gave insufficient deference to the compelling state interests herein -- effective law enforcement and the apprehension of fleeing criminals. The rule adopted favors the criminal and encourages flight to avoid capture." Brief for Petitioners at 8. Amici believe that the available evidence indicates that the public's interest in effective law enforcement is furthered by the decision of the Court of Appeals.

I. LAWS THAT AUTHORIZE THE POLICE TO EMPLOY DEADLY FORCE TO APPREHEND ALL FLEEING FELONY SUSPECTS DO NOT CONTRIBUTE TO THE ABILITY OF THE POLICE TO FIGHT CRIME OR TO PROTECT THEMSELVES

Through long personal and professional experience, amici know well the terrible costs of crime to American society and the dangers it presents to law-abiding citizens and to police officers. Amici share the frustration of

all law-abiding citizens with our high rates of crime and, as police professionals and students of police operations, amici would not argue that this Court should take any action that would unreasonably diminish the ability of the police to prevent or detect crime, to apprehend criminals, or to protect the public or themselves. Affirming the decision of the Sixth Circuit in this case, however, as amici urge, will result in no diminution of police effectiveness.

If expansive use of police deadly force had a measurable effect upon crime and public safety, one would expect to find some association between the breadth of police authority to use deadly force and measures of crime and public and police safety. One would expect that rates of crime and violence would be lowest in jurisdictions in which police authority to use deadly force was most

broad, and one would expect that jurisdictions that more clearly defined and limited police officers' authority to use deadly force would experience increased crime rates and decreases in the safety of the public and the police.

All the available evidence indicates that expansive use of police deadly force to apprehend fleeing suspects is in no way associated with reduced rates of crime or with increased safety of the public or the police. For example, in 1968, the Oakland, California, Police Department established an administrative policy prohibiting use of deadly force to apprehend fleeing auto theft and burglary suspects. In a 1971 evaluation of the effects of that policy, then Police Chief Charles Gain reported that:

> There is absolutely no evidence supporting the proposition that restrictive [deadly force] policies adversely affect

the arrest rate for burglary and auto theft. Our own experience in Oakland indicates that tne institution of a policy restricting the use of deadly force against burglars had no effect, one way or the other, upon the arrest rate for burglary. . . . There is no evidence whatever to support the contention that police authority to shoot is a deterrent to the commission of the crime. . . . It cannot be demonstrated that police firearms policies have had any effect, one way or the other, on the increase in the incidence of crime.

. . . .

"[N]ot a single [police] officer has been injured, killed or placed in jeopardy because of the restrictions upon his authority to fire."

C. Gain, Discharge of Firearms Policy: Effecting Justice Through Administrative Regulation -- A Position Paper at 18 & 25 (Report released December 23, 1971 by Oakland Police Chief Charles Gain in explanation of a change in departmental deadly force

policy), cited in W. A. Geller & K. J. Karales, Split-Second Decisions: Shootings Of & By Chicago Police at 67-68 (1981)

A 1979 study of the effects of a New York City Police Department regulation that restricted officers' authority to employ deadly force against fleeing suspects reached similar findings. It analyzed 2,926 police shooting incidents. It reported that implementation of the Police Department regulation was followed by a 75 percent decrease (from 2.0 per week to 0.5 per week) in incidents in which officers fired shots at fleeing suspects who presented no imminent threat to life. The number of people shot and non-fatally wounded by the police decreased by 41 percent (from 3.9 to 2.3 weekly), and the number of fatal shootings declined by 38 percent (from 1.6 to 1.0 weekly). These declines, however, had no adverse effect

on rates of crime or arrest rates. Police injuries and deaths decreased following the directive. J. Fyfe, Administrative Interventions on Police Shooting Discretion: An Empirical Examination, 7 J. Crim. Just. 309 (1979).

A study published just last year of police use of deadly force in Atlanta similarly reported that restriction of police shooting discretion in that city was accompanied by a decrease in police use of deadly force and that there was no effect upon violent crime rates, arrest rates, or police injury and death rates. L. Sherman, Reducing Police Gun Use, in M. Punch, Control in the Police Organization 98 (1983).

Amici are aware of no empirical evidence, reports or studies that establish a public benefit flowing from broad use of police deadly force.

Broad police deadly force statutes actually work against the primary police responsibility to protect life and enforce the law. Whenever police officers kill citizens, tensions between police and the communities they serve are likely to increase, especially when police take the lives of persons who present no clear and present danger to officers or others. Consequently, it becomes more difficult for the police to obtain public cooperation in their daily efforts to protect life and to fight crime. Police inability to obtain cooperation and information ultimately results in failure to identify violent offenders and in further loss of life. President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: The Police 144 (1967).

On occasion, public reaction to instances of police use of deadly force

has included violence and further loss of life. The National Advisory Commission on Civil Disorders reported that police shootings were followed by riots in New York City in 1964; that the fatal police shooting of a young black led to violent demonstrations in Los Angeles in 1966; that, in 1966, a fatal police shooting of an auto thief in Atlanta nearly precipitated a riot; and that 1967 riots in Tampa were triggered by the fatal police shooting of a young black fleeing from a burglary. Report of the National Advisory Commission on Civil Disorders at 36, 38 & 42 (1968). In addition, in 1966, disturbances followed the fatal police shooting of a fleeing car thief in San Francisco, and a fatal shooting in St. Louis. President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: The Police 189 (1967). More recently, fatal

shootings by police in New York City, Birmingham, New Orleans, and Miami have led to public disorder and violence.

The primary police responsibility of protecting life and enforcing law is best served by reducing use of deadly force to an absolute minimum by providing meaningful guidelines for officer discretion. Indeed, the police as well as the public will benefit from standards that are more carefully tailored than the Tennessee statute's. Under any circumstances, the taking of a life produces trauma for the police officer. A. Cohen, I've Killed That Man 10,000 Times, 3 Police 17 (1980). When such a killing occurs under circumstances that are legally justifiable but that subsequently raise questions of judiciousness, fairness, and propriety, that trauma is bound to be increased. Laws that authorize police to

use deadly force to apprehend all fleeing felony suspects but provide no other guidance, encourage such killings and expose police officers to unnecessary criticism, trauma, and civil liability.

In a real sense, the officer who shot Edward Eugene Garner has been severely victimized by the statute in question on which he based his decision to shoot. Over the nearly ten years since Garner's death, this officer has been publicly criticized and second-guessed. The criticism, trauma, and liability that have affected the life of this officer are far more attributable to the inadequacy of the laws and rules under which he acted than they are to his own actions.

The Delaware Police Chiefs' Council eloquently stated the forces that work upon police officers who find themselves in situations like that

leading to the death of Edward Eugene Garner:

> The decision to employ deadly force against another human being is in all probability the most serious and difficult decision a law enforcement officer will be faced with. The primary responsibility of the police is that of protecting life. This responsibility dictates the need for consideration of not only the legal aspect of the use of deadly force, but also the moral issues arising from a reverence for the value of life. It is, therefore, in the interest of both the public and the law enforcement officer that uniformly accepted guidelines clearly govern the use of firearms in the enforcement of the law.
>
> J. Klenoski, Administrative Policy Statements: Deadly Force 1 (May 21, 1981).

Laws authorizing police to employ deadly force to apprehend all fleeing felony suspects include no such

clear guidelines. Indeed, they place officers who serve under those statutes in the terrible position of having to live forever with the consequences of the instantaneous decision, made without real legislative guidance as to whether and when it is appropriate to take the life of a non-violent fleeing felony suspect. Thus, laws that authorize police officers to employ deadly force to apprehend all fleeing felony suspects are likely to lead to arbitrariness in the taking of life by police officers. This increases the exposure of officers to censure, trauma, and civil liability. Conversely, because such laws so inadequately define appropriate police behavior, officers who refrain from using deadly force will always be uncertain that they have acted correctly. In either case the long-term effects of such laws upon both sets of police officers is bad for their

understanding of and respect for the law and their duties and for their general effectiveness and morale.

II. AFFIRMANCE WILL BE CONSISTENT WITH MOST POLICE DEPARTMENT POLICIES AND PRACTICES AND WILL NOT UNDULY INTRUDE ON CRIMINAL LAW ENFORCEMENT

The State of Tennessee and the City of Memphis and its Police Department have argued that the rule adopted by the Court of Appeals "places burdensome and impractical constraints on effective law enforcement," Jurisdictional Statement at 7, and that it "will create much confusion among law enforcement officers...." Petition for Cert. at 11. That is simply not so. The Court of Appeals has adopted a standard that is clear, workable, and not unduly

restrictive of law enforcement. Before an officer uses deadly force to stop a fleeing felony suspect, he or she must have "an objective, reasonable basis in fact to believe that the felon is dangerous or has committed a violent crime." 710 F.2d at 241.

In fact, the actual practices of most law enforcement agencies demonstrate the practicability of the standard adopted by the Court of Appeals. Most jurisdictions studied already restrain the use of deadly force by police officers in a manner that is as restrictive or more restrictive than that adopted by the court below. The common sense of law enforcement professionals across the nation is that these restrictive standards are workable and do

not hamper law enforcement.*

There has been a steady move to

---

* The actual practices of most police departments are in fact governed by municipal or departmental policies more restrictive than state laws. See K. Matulia, A Balance of Forces: A Report of the International Association of Chiefs of Police at 153-54 (1982). For example, Michigan is a common law jurisdiction. See Werner v. Hartfelder, 113 Mich. App. 747, 318 N.W.2d 825 (1982), appeal denied, 418 Mich. 906, 342 N.W.2d 520 (1984). But more than half of the local law enforcement agencies have deadly force policies that are more restrictive than the common law and about 75 percent of those are consonant with the standard adopted by the court of appeals in this case. Staff Report to the Michigan Civil Rights Commission at 54 et seq. (May 18, 1981). This trend is particularly true of major metropolitan areas. Although Arizona, Connecticut, Massachusetts, New Mexico, and Ohio are common law states, Phoenix, New Haven, Boston, Alburquerque, Santa Fe, Cincinnati, and Dayton all have deadly force policies that would bar the shooting in this case. App. 1318, 1291, 1131, 1110, 1330, 1209 & 1218. (App. citations are to the docketed Court of Appeals record. Jt. App. citations are to the Joint Appendix prepared by the parties for the Court.)

restrain the police use of deadly force. More than twenty years ago the Model Penal Code proposed to restrict police autho ity to employ deadly force against all fleeing felony suspects. Model Penal Code § 3.07(2)(b) (Proposed Official Draft 1962).

In 1967, the President's Commission on Law Enforcement and Administration of Justice observed:

> Deadly force should be restricted to the apprehension of perpetrators who, in the course of their crime threatened the use of deadly force, or if the officer believes there is a substantial risk that the person whose arrest is sought will cause death or serious bodily harm if his apprehension is delayed.
>
> President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: The Police at 189 (1967).

In 1983, the federally funded Commission on Accreditation for Law

Enforcement Agencies, which is composed of judicial, legislative, state and local government, academic, and law enforcement representatives, adopted the following model policy and commentary on use of deadly force:

> 1.3.2 A written directive states that an officer may use deadly force only when the officer reasonably believes that the action is in defense of human life, including the officer's own life, or in defense of any person in immediate danger of serious physical injury.
> Commentary: The purpose of this standard is to provide officers with guidance in the use of force in life and death situations and to prevent unnecessary loss of life. Definitions of "reasonable belief," and "serious physical injury" should be included in the directive.
> 1.3.3 A written directive specifies that use of deadly force against a "fleeing felon" must meet the conditions required by standard 1.3.2.
> Commentary: A "fleeing felon" should not be presumed to pose an

> immediate threat to life in the absence of actions that would lead one to believe otherwise, such as a previously demonstrated threat to or wanton disregard for human life.
>
> Program Commission on Accreditation for Law Enforcement Agencies, Inc., Standards For Law Enforcement Agencies: The Standards Manual of the Law Enforcement Agency Accreditation at 1-12 (Aug. 1983) (emphasis in original).

These standards were drafted and unanimously recommended to the Commission by the International Association of Chiefs of Police ("IACP"), NOBLE, the National Sheriffs' Association and PERF.

In a United States Department of Justice-supported study of police deadly force in 53 American cities with populations over 250,000, the International Association of Chiefs of Police reported that, as of 1980, 46 police departments (86.8 percent) had

promulgated administrative rules that prohibited officers from employing deadly force to "arrest any felon," that four (7.5 percent) permitted such deadly force, and that the administrative policies of three (5.7 percent) did not address this issue.

Thus, nearly seven in eight of the major municipal police departments in the United States did not permit officers to use deadly force to apprehend all felons. K. Matulia, A Balance of Forces: A Report of the International Association of Chiefs of Police at 161 (1982). On the basis of its analysis, IACP recommended the following guideline on use of deadly force to effect apprehensions:

> An officer may use deadly force to effect the capture or prevent the escape of a suspect whose freedom is reasonably believed to represent an imminent threat of grave

> bodily harm or death to the officer or other person(s).

Id. at 164 (emphasis in original).

A 1982 survey of the deadly force policies of 75 police departments whose chief executives were members of PERF by that organization's staff found that 74 prohibited use of deadly force to apprehend all fleeing felony suspects.

These statements and the IACP and PERF findings regarding the small number of police agencies adhering to the rule that deadly force is permissible to apprehend all fleeing felony suspects demonstrate that the law enforcement community generally considers this standard reprehensible. Indeed, since the death of Edward Eugene Garner, the Memphis Police Department itself has adopted an administrative policy prohibiting its officers from using

deadly force in situations such as the instant. Memphis Police Department, Training Academy, General Order Number 95-79, Deadly Force Policy (July 16, 1979), Jt. App. at 45, cited in J. Fyfe, Blind Justice: Police Shootings in Memphis, 73 J. of Crim. L. & Crim. 722 (1982).

Very few police departments actually use deadly force to stop fleeing suspects. Only a small minority of police firearm discharges nationwide are for the purpose of stopping fleeing felony suspects.* This use of deadly

---

* The figures vary, of course, from city to city depending on that city's policy. See App. 791 (11.3% in New York between 1971-1975); W.A. Geller, K.J. Karales, Split-Second Decisions: Shootings of & by Chicago Police, 6 (Chicago Law Enforcement Study Group 1981) (17% between 1974-1978); M. Meyer, Police Shootings at Minorities: The Case of Los Angeles, 52 Annals 98, 103-104

Footnote Continued

force is insignificant to the ability of the police to make felony arrests. For example, between 1969 and 1974, Memphis police made more than twenty-six thousand arrests for property crimes. App. 1767. As the Memphis police director observed: "of all arrests how many involve the use of deadly force, I would say it would be less than one percent, probably less than a half percent.... [I]f you want to even boil it down to arrests of felons I think

---

• Footnote Continued From Previous Page

(1980) (between 1974-1978, 15% of all shootings at black, 9% of all shootings at Hispanics, and 9% of all shootings at whites); M. Blumberg, The Use of Deadly Firearms by Police Officers: The Impact of Individuals, Communities, and Race, 201 (Ph.D. Dissertation, State University of New York, Albany, Sch. of Crim. Justice, Dec. 14, 1982) (7.8% in Atlanta between 1975-1978; between 1973-1974, 4.6% in the District of Columbia, 10% in Portland, Ore., but 58.1% in Indianapolis).

you'd still find it less than -- well, let's say you'd find it a minute percentage point." App. 957-58. Dr. Fyfe has observed: "[I]n order for the police to have cleared even 1 percent [more] of the non-violent felonies [burglary, larceny, and auto larceny] reported in 1978 through 'apprehensions effected by shooting,' they would have had to increase the rate at which they shot people during that year by at least fifty-fold. Doing so would have resulted in approximately 35,000 fatalities and 70,000 woundings." J. Fyfe, Observations on Police Deadly Force, 27 Crim. & Delinq. 376, 381 (1981).

In applying constitutional dictates this Court has made many decisions which have had a substantial impact on police policies and procedures and have arguably limited the effectiveness of police operations.

E.g., Payton v. New York, 445 U.S. 573 (1980) (restricting police authority to enter residence to make arrest without arrest warrant); Delaware v. Prouse, 440 U.S. 648 (1979) (restricting police authority randomly to stop motorist); Chimel v. California, 395 U.S. 752 (1969) (denying police authority to search beyond suspect's body pursuant to arrest); Sibron v. New York, 392 U.S. 40 (1968) (narrowing police authority to search a suspect); Katz v. United States, 389 U.S. 347 (1967) (limiting police authority to eavesdrop); Wong Sun v. United States, 371 U.S. 471 (1963) (confining police authority to arrest without a warrant); Mapp v. Ohio, 367 U.S. 643 (1961) (restricting use of unreasonably seized evidence); Rochin v. California, 342 U.S. 165 (1952) (police authority to use stomach pump on suspect). Most recently, this Court

struck as unconstitutionally vague a California statute that authorized police to arrest pedestrians who failed to provide to a police officer credible and reliable identification and to account for their presence. Kolender v. Lawson, 103 S. Ct. 1855 (1983).

In all of these cases, the Court has delineated the limits of police authority under the Constitution and has directed police not to employ former practices that had been in widespread and effective use. Police use of deadly force to apprehend fleeing suspects is not common. Accordingly, affirmance of the decision below, which protects the due process right to life, will not substantially intrude on current police policies and procedures. Police discretion to use deadly force to apprehend a fleeing felon endangers a more fundamental right -- the right to

life -- than any of the police techniques that this Court has found prohibited by the Constitution.

III. LAWS THAT AUTHORIZE POLICE USE OF DEADLY FORCE TO APPREHEND ALL FLEEING FELONY SUSPECTS FAIL ADEQUATELY TO GUIDE POLICE OFFICER DISCRETION

The adoption of restrictive administrative policies governing deadly force in states with laws otherwise authorizing police use of deadly force to apprehend all fleeing felony suspects is largely dependent upon the individual predilections and philosophies of police chiefs. G. Uelman, Varieties of Police Policy: A Study of Police Policy Regarding the Use of Deadly Force in Los Angeles County, 6 Loy. L.A. L. Rev. 1 (1973), cited in U.S. Department of Justice, A Community Concern: Police Use of Deadly Force at 88-89 (1979). Where there are no administrative guidelines, shooting is left to the discretion of the

individual police officer. The question of when police officers are permitted to take a life should no more be a matter of unlimited administrative prerogative or unguided officer discretion than should the imposition of capital punishment be totally at the discretion of local juries. In Furman v. Georgia, 408 U.S. 238 (1972), this Court ruled that the death penalty may not be imposed even after conviction for murder unless the legislature has given the sentencing authority guidance adequate to eliminate arbitrariness and capriciousness. The Tennessee statute at issue in this case gives police officers on the street unbridled discretion whether to shoot to kill any time a fleeing suspect may have committed some felony. This unguided discretion is far less tolerable in a well-ordered system of criminal justice.

There can be little doubt that statutes like the one involved in this case lead to arbitrary exercises of deadly force. One scholar has conducted an experiment in which he presented hypothetical fact patterns concerning three arrest situations to 25 randomly selected police officers in Connecticut, a state in which the common law allows police to use deadly force to apprehend all fleeing felony suspects. Although all 25 officers were making decisions on the basis of the same state law, they split almost evenly when asked if they would be likely to use deadly force in identical situations. G. Hayden, Police Discretion in the Use of Deadly Force: An Empirical Study of Information Usage in Deadly Force Decision Making (1979) (unpublished paper available at the University of New Haven), cited in L. Sherman, Execution Without Trial: Police

Homicide and the Constitution, 33 Vand. L. Rev. at 95 n.150 (1980).

Another scholar found a correlation between use of deadly force and personal characteristics of the officer based on analysis of the results of a questionnaire administered to 151 patrol officers from two unnamed municipal police departments in the central south and the midwest. The officers were asked to identify eight personal characteristics* and judge the appropriateness of using deadly force in twelve hypothetical police situations. A high degree of agreement among these officers was found in eleven of these situations. Of the twelfth hypothetical,

---

* Officer's age; assignment, sex; race; length of police service; if officer had been victim of a felonious assult; military experience.

a "classic fleeing felon situation [in which] an officer sees and shoots a burglar fleeing the scene of his crime," however, the officers' assessments of the appropriateness of using deadly force varied significantly with seven of the eight personal characteristics analyzed. Officers with high educational levels were significantly less likely than less well educated officers to regard shooting in the fleeing felon hypothetical as appropriate. The study also found that:

> Older officers were less likely to agree with the use of a firearm to apprehend a fleeing burglar suspect than respondents in other age groups. Younger officers may be in the "badge is heavy" phase of their careers as police officers. They are most likely to be cynical, alienated, and definite in their opinions. They may also be the group of police officers most likely to shoot someone.

Brown, Use of Deadly Force by Police Officers: Training Implications, 12 J. Pol. Sci. & Admin. 133, at 139 (1984).

Appellant and Petitioners argue that the decision below invades the province of the state legislature. The real issue, however, is whether the policy manifested by the Tennessee statute is one the Constitution permits a legislature to adopt. This Court should conclude that the Constitution requires states to impose rationally and factually based limits on police discretion to kill prior to indictment or conviction, just as it has held that legislatures may not delegate unrestrained discretion to impose capital punishment after conviction.

Even though there are distinctions between capital punishment and police use of deadly force, the distinctions do not justify the breadth

of discretion allowed here. Unlike capital punishment, police use of deadly force does not always kill, because officers sometimes miss or only wound their targets. But police deadly force is almost always employed before adjudication, without careful procedures to ascertain actual guilt. The greater risk of error and of irreparable injury warrants tighter control over potentially lethal public authority.

No state capital punishment statute allows for as much arbitrariness as do statutes authorizing police deadly force to apprehend any fleeing felony suspect. A decision to execute invariably followed a substantial trial and is subject to extensive review by appellate courts and by the state executive before it results in death. There is no such check on the wisdom of a police officer's decision to use deadly

force to apprehend a fleeing felony suspect. As in this case, the decision to employ deadly force is typically made in a dark alley or rear yard. It is almost <u>always</u> quick, unilateral, and irreversible. Thus, the Constitution should constrain the permissible scope of official discretion where the legislature authorizes police use of extra-judicial deadly force. The Tennessee statute does not satisfy this test.

CONCLUSION

Thirteen years ago Chief Justice Burger wrote:

> From time to time judges have occasion to pass on regulations governing police procedures. I wonder what would be the judicial response to a police order authorizing "shoot to kill" with respect to every fugitive. It is easy to predict our collective wrath and outrage. We, in common with all rational minds, would say that the police response must

> relate to the gravity and need; that a "shoot" order might conceivably be tolerable to prevent the escape of a convicted killer but surely not for a car thief, a pickpocket or a shoplifter.
>
> Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 419 (1971) (dissenting opinion).

Amici agree wholeheartedly with the Chief Justice. The Tennessee statute in question is, in fact, an authorization to shoot to kill car thieves, pickpockets, and shoplifters, and it cannot be justified as a legitimate exercise of public authority. We urge affirmance of the judgment of the Court of Appeals.

Respectfully submitted,

/s/ William Josephson

William Josephson, Esq.
Counsel of Record
Fried, Frank, Harris, Shriver & Jacobson
(A partnership which includes professional corporations)
One New York Plaza
New York, New York 10004
(212) 820-8220
Attorneys for Amici Curiae

August 6, 1984

APPELLEE'S

BRIEF

Office - Supreme Court, U.S.
FILED
AUG 9 1984
ALEXANDER L. STEVAS,
CLERK

Nos. 83-1035
83-1070

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

THE STATE OF TENNESSEE *Appellant*,

v.

CLEARTEE GARNER, as father and next of kin of Edward Eugene Garner, a deceased minor, *Appellee*.

MEMPHIS POLICE DEPARTMENT;
CITY OF MEMPHIS, TENNESSEE, *Petitioners*,

v.

CLEARTEE GARNER, *et al.*, *Respondent*.

On Appeal From The United States Court Of Appeals For The Sixth Circuit In No. 83-1035

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit In No. 83-1070

BRIEF FOR APPELLEE-RESPONDENT

J. LEVONNE CHAMBERS
STEVEN L. WINTER*
99 Hudson Street
New York, New York 10013
(212) 219-1900
WALTER L. BAILEY, JR.
Suite 901, Tennko Building
161 Jefferson Avenue
Memphis, Tennessee 38103
(901) 523-1360
Attorney for Appellee-Respondent

*Counsel of Record

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Does the killing of a non-dangerous, fleeing property crime suspect whom the officer reasonably believes to be unarmed violate the fourth and fourteenth amendments?
2. Does a municipal policy and custom of liberal use of deadly force that results in the excessive and unnecessary use of such force to stop non-dangerous, fleeing felony suspects violate the fourth and fourteenth amendments?
3. Is the Memphis policy authorizing the discretionary shooting of nondangerous, fleeing property crime suspects racially discriminatory?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
A. The Facts of the Shooting	1
B. The Proceedings Below	10
C. The Memphis Policy: Liberal Use of Deadly Force	13
D. The Memphis Custom: Racial Discrimination	21
SUMMARY OF ARGUMENT	31
ARGUMENT	34
I. THE COURT OF APPEALS CORRECTLY BALANCED THE NATURE OF THE INTRUSION AGAINST THE STATE'S INTERESTS IN LAW ENFORCEMENT AND HELD THAT THE KILLING OF AN UNARMED, NONVIOLENT, FLEEING PROPERTY CRIME SUSPECT VIOLATES THE CONSTITUTION	34
A. The Fourth Amendment Requires a Balancing of the Interests	35

	Page
(1) The common law basis of the doctrine no longer supports the reasonableness of shooting all fleeing felons	44
(2) The Tennessee Statute's disregard of the gravity of the undelying offense is a proper consideration under the fourth amendment	49
B. The Deprivation of Life Must be Justified by Countervailing State Interests	52
C. The Prohibition Against Punishment without Due Process Also Requires Consideration of State Interests Asserted in Justification	55
D. A Balancing of the Interests Demonstrates that the Fleeing Felon Doctrine is Unconstitutional	65
(1) Apprehension of the suspect	68
(2) The crime prevention interests	72
(3) The safety interests.	75

		Page
	(4) Effective law enforcement.....	81
II.	THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE AFFIRMED BECAUSE THE MEMPHIS POLICY AND CUSTOM IS ONE OF LIBERAL USE OF DEADLY FORCE THAT RESULTS IN THE EXCESSIVE AND UNNECESSARY USE OF SUCH FORCE TO STOP NONDANGEROUS, FLEEING FELONY SUSPECTS.....	90
III.	MEMPHIS'S POLICY AUTHORIZING THE DISCRETIONARY SHOOTING OF NONDANGEROUS, FLEEING PROPERTY CRIME SUSPECTS VIOLATES THE FOURTH AMENDMENT AND THE EQUAL PROTECTION CLAUSE BECAUSE IT INVITES AND RESULTS IN RACIAL DISCRIMINATION.....	96
CONCLUSION.....		104

TABLES OF AUTHORITIES

Cases	Page
Addington v. Texas, 441 U.S. 418 (1979).....	88,90
Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977).....	97
Ayler v. Hopper, 532 F. Supp. 198 (M.D. Ala. 1981).....	54
Baker v. McCollan, 443 U.S. 137 (1979).....	89
Barefoot v. Estelle, ___ U.S. ___, 77 L.Ed.2d 1090 (1983).....	85
Beck v. Ohio, 379 U.S. 89 (1964)....	103
Beech v. Melancon, 465 F.2d 425 (6th Cir. 1972).....	91
Bell v. Wolfish, 441 U.S. 520 (1979).....55,56,64	
Bivens v. Six Unknown Agents, 403 U.S. 388 (1971).....51,67,83	
Brandon v. Holt, No. 83-1622 (pending).....	20,93
Brinegar v. United States, 338 U.S. 360 (1949).....	88
Brown v. Texas, 443 U.S. 47 (1979).....102,103	
Byrd v. Brishke, 466 F.2d 6 (7th Cir. 1972).....	42

Cases	Page
Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971), rev'd on other grounds, 409 U.S. 418 (1973)	42
Castaneda v. Partida, 430 U.S. 482 (1977)	100,101
Cleveland Board of Education v. Lafleur, 414 U.S. 632 (1974)	53
Coker v. Georgia, 433 U.S. 584 (1977)	46,74,75
Cunningham v. Ellington, 323 F. Supp. 1072 (W.D. Tenn. 1971)	91
Cupp v. Murphy, 412 U.S. 29 (1973)	37
Dalia v. United States, 441 U.S. 238 (1979)	38
Davis v. Mississippi, 394 U.S. 721 (1969)	37,41-42
Delaware v. Prouse, 440 U.S. 648 (1979)	71,103
Donovan v. Dewey, 452 U.S. 594 (1981)	103
Dunaway v. New York, 442 U.S. 200 (1979)	37
Eddings v. Oklahoma, 455 U.S. 104 (1982)	62
Enmund v. Florida, 458 U.S. 762 (1982)	75,81

Cases	Page
Florida v. Royer, 460 U.S. , 75 L.Ed.2d 229 (1983)	39-40,41,71
Furman v. Georgia, 408 U.S. 238 (1972)	57,97
Garner v. Memphis Police Department, 600 F.2d 52 (6th Cir. 1979)	Passim
Garner v. Memphis Police Department, 710 F.2d 240 (6th. Cir. 1983)	Passim
Gerstein v. Pugh, 420 U.S. 103 (1975)	89
Giant Foods, Inc. v. Scherry, 51 Md. App. 586 544 A.2d 483 (1982)	86
Gregg v. Georgia, 428 U.S. 253 (1976)	46,74
Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974)	42
Hayes v. Memphis Police Dept., 571 F.2d 357 (6th Cir. 1978)	91
Herrera v. Valentine, 653 F.2d 1220 (8th Cir. 1981)	42
Howell v. Cataldi, 464 F.2d 272 (3rd Cir. 1972)	42
Ingraham v. Wright, 430 U.S. 651 (1977)	55

Cases	Page
In re Winship, 397 U.S. 358 (1972).....	88
Jacobs v. City of Wichita, 531 F. Supp. 129 (D. Kan. 1982).....	54
Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970).....41,42-43	
Johnson v. Glick, 481 F.2d 1028 (2d Cir.), cert. denied, 414 U.S. 1033 (1973).....	42,54
Johnson v. Zerbst, 304 U.S. 458 (1938).....	53
Jones v. Marshall, 528 F.2d 132 (2d Cir. 1975).....	62
Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).....55,56,64-65,75	
Ker v. California, 374 U.S. 23 (1963).....	38
Londrigan v. City of Warwick, 628 F.2d 736 (1st Cir. 1980).....	
Leite v. City of Providence, 463 F. Supp. 585 (D.R.I. 1978)...	95
Lewis v. State, 398 So.2d 432 (Fla. 1981).....	79
Mattis v. Schnarr, 547 F.2d 1007 (8th Cir. 1976), vacated on case and controversy grounds sub nom. Ashcroft v. Mattis, 431 U.S. 171 (1977).....	62

Cases	Page
May v. Anderson, 345 U.S. 528 (1953).....	53
McDonald v. United States, 335 U.S. 451 (1948).....	58
McKenna v. City of Memphis, 544 F. Supp. 415 (W.D. Tenn. 1982)...	95
Michigan v. Summers, 452 U.S. 692 (1981).....	40
Monell v. Department of Social Services, 436 U.S. 658 (1978)....	95
Morgan v. Lebish, 368 F.2d 338 (10th Cir. 1966).....	62
Payton v. New York, 445 U.S. 573 (1980).....	48,86
Pruitt v. City of Montgomery, Civ. Act. No. 83-T-903-N (M.D. Ala. June 12, 1984).....	89
Qualls v. Parish, 534 F.2d 690 (6th Cir. 1976).....	62,91
Roe v. Wade, 410 U.S. 113 (1973)....	53,21
Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972).....	100
Schall v. Martin, ___ U.S. ___, 81 L.Ed.2d 201 (1984).....	85
Schmerber v. California, 384 U.S. 757 (1966).....	38,42

Cases	Page
Screws v. United States, 325 U.S. 91 (1945).....	53,57
Sibron v. New York, 392 U.S. 40 (1968).....	85
Smith v. Phillips, 455 U.S. 209 (1982).....	92
Stanley v. Illinois, 405 U.S. 645 (1972).....	53
Taylor v. Collins, 574 F. Supp. 1554 (E.D. Mich. 1983).....	48
Taft v. Seward, 689 F.2d 637 (6th Cir. 1982).....	42
Terry v. Ohio, 392 U.S. 1 (1968).....36,37,38,40,41,85,103	
United States v. Calandra, 414 U.S. 338 (1974).....	38
United States v. City of Memphis, Civ. Action C-7 4-286 (W.D. Tenn. 1974).....	31
United States v. Clark, 31 Fed. 710 (C.C.E.D. Mich. 1887).....	59-60
United States v. New York Telephone, 434 U.S. 159 (1977).....	92
United States v. Place, ___ U.S. ___, 77 L.Ed. 2d. 110 (1983).....37,38,42-41	
United States v. Stokes, 506 F.2d 771 (5th Cir. 1975).....	42

Cases	Page
United States v. Villamonte-Marquez, ___ U.S. ___, 77 L.Ed.2d 22 (1983).....	41
United States v. Villarin Gerena, 553 F.2d 723 (1st. Cir. 1977)....	42
Warden v. Hayden, 387 U.S. 294 (1967).....	39
Washington v. Davis, 426 U.S. 592 (1976).....97,100	
Welsh v. Wisconsin, ___ U.S. ___, 80 L.Ed.2d 732 (1984).....	52,53
Werner v. Hartfelder, 113 Mich. App. 747, 318 N.W. 2d 825 (1982).....	88
Wiley v. Memphis Police Dept., Civ. Action No. C-73-8 (W.D. Tenn. June 30, 1975), aff'd 548 F.2d 1247 (6th Cir. 1977).....22,62,63,83,91	
Wilkes v. Wood, 10 Howell, St. Tr. 1153 (1773).....	102
Williams v. Kelly, 624 F.2d 695 (5th Cir. 1980).....	52,54
Woodson v. North Carolina, 428 U.S. 280 (1976).....	57
Yick Wo v. Hopkins, 118 U.S. 356 (1886).....53,96,97,104	

Page

Constitutional Provisions and Statutes:

U.S. Const. amend. IV..... Passim

U.S. Const. amend. XIV..... Passim

42 U.S.C. § 1983..... 11

Memphis City Code § 30-15..... 40

Memphis City Code § 1-8..... 40

Pub. Stats. of Tenn. §§ (Supp 1858-1871)..... 44

Tennessee Code Ann. § 37-102 (1977)..... 83

Tennessee Code Ann. § 39-3-401 (1973)..... 40,79

Tennessee Code Ann. § 40-808 (1975)..... 45,68

Other Authorities:

A.L.I. Model Penal Code Vol. II, Art. 222.1..... 78

W. Blackstone, COMMENTARIES (1800)..... 44

M. Blumberg, The Use of Deadly Firearms by Police Officers: The Impact of Individuals, Communities, and Race (Ph.D. Dissertation, S.U.N.Y., Albany, Sch. of Crim. Justice Dec. 14, 1982)..... 92

Page

Bohlen & Schulman, Arrest With and Without a Warrant, 75 U.Pa.L.Rev. 485 (1927)..... 58

Comment, Deadly Force to Arrest: Triggering Constitutional Review, 11 Harv.Civ. R. Civ. Lib. L.Rev. 361 (1976).....44-45,46,58

Conklin and Bittner, Burglary in a Suburb, 11 Criminology 208 (1973)..... 60

W. A. Geller & K. J. Karales, Split Second Decisions: Shootings of and by Chicago Police (Chicago Law Enforcement Study Group) (1981)..... 91

Holmes, The Paths of The Law, 10 Harv. L. Rev. 457 (1897)..... 48-49

C. Kenner and J. Anderson, THE GUN IN AMERICA (1975)..... 47

"Magnum Force, Massive Lawsuits (More and More Communities Urge Police to Show Restraint)," The New York Times, April 8, 1984, p. 2 E, col. 4..... 66

Matulia, A Balance of Forces: A Report of the International Association of Chiefs of Police (National Institute of Justice 1982).....83,86-87

Page

9 A.L.I. PROCEEDINGS 186-87 (1931) quoted in J. Michael & H. Wechsler, CRIMINAL LAW AND ITS ADMINISTRATION, 80-82 n. 3 (1940)..... 41

M. Myer, Police Shootings at Minorities: The Case of Los Angeles, 32 Annals of Amer. Acad. of Pol. & Sci. 98 (1980)..... 92

Note, The Use of Deadly Force in Arizona By Police Officers, 1972 L. & Soc. Order 487..... 58

Note, Legalized Murder of a Fleeing Felon, 15 Va. L. Rev. 382 (1929)..... 58

R. Perkins, CRIMINAL LAW (2d ed. 1969)..... 58

T. Reppetto, RESIDENTIAL CRIME (1974).....79,80,81

Sherman, Execution Without Trial: Police Homicide and the Constitution, 33 Vand. L. Rev. 71 (1980).....46,47,59,61

N. Shovell, BURGLARY AS AN OCCUPATION (1971)..... 79

Staff Report to the Michigan Civil Rights Commission (May 18, 1981)..... 87

Page

T. Taylor, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION (1969)..... 45

I. Walker & N. Shinire, BURGLARY THE VICTIM AND THE PUBLIC (1978)..... 79,80

J.Q. Wilson, THINKING ABOUT CRIME (1975) 73

Z. L. Wroth & J. Zobel (eds.) LEGAL PAPERS OF JOHN ADAMS (1965)..... 102

BRIEF FOR APPELLEE-RESPONDENT

****

STATEMENT OF THE CASE

A. The Facts of the Shooting

Edward Eugene Garner, a fifteen-year-old black, was shot and killed by a Memphis police officer on the night of October 3, 1974. He was an obvious juvenile; slender of build, he weighed between 85 and 100 pounds and stood only five feet and four inches high. R. 78; J.A. 64-65.[1] The officer who shot him thought that young Garner was a juvenile about seventeen or eighteen-years-old. J.A. 44, 54.

---

[1] Citations to the Joint Appendix in this Court are designated as J.A. ____. Citations to the opinions below are to the appendix to the petition for writ of certiorari in No. 83-1070 and are designated as A. ____. Citations to the record below are to the record as collected and paginated in the Joint Appendix in the Sixth Circuit and are designated as R. ____.

The critical facts of the shooting are substantially different than those presented by the appellant and the petitioner. Contrary to their assertions, State's Brief at 3-4; City's Brief at 3-4: the officer had no basis upon which to assume the existence of an accomplice; he fired despite his reasonable belief that Garner was <u>not</u> armed; and he fired from a position only seconds away from young Garner.

On the night of October 3, 1974, Officers Hymon and Wright responded to a burglary-in-progress call at 737 Vollentine in Memphis. When they arrived on the scene, the complainant was vague and inarticulate. Officer Wright described what occurred:

> [S]he was pointing to the house next door which we found later was 739 Vollentine, and she was moving her mouth but both of us were inside the car, and, of course, the engine was running and couldn't hear anything. So my partner opened the door and got out and went over to her and she was

> still pointing and she wasn't saying anything. Finally, I was leaning over in the street like this to hear what she was saying through the open door. She said, "Somebody is breaking in there right now."

J.A. 75-77.

Officer Hymon described the interchange with the complainant in similar terms, noting that he did not understand her to be saying that there was more than one burglar.

> When we arrived, the -- lady was standing in the door at 737 Vollentine, and she was pointing towards 739 Vollentine, and she was, you know, just making a gesture with her finger, pointing in that direction. And I asked her what she was saying, and she made another gesture, made some type of gesture with her mouth, and I couldn't understand her, so I went up to the porch and asked her what she was saying. <u>Roughly I recall her saying</u>, "They are breaking inside."

Q. You used the term "They are breaking in." Did you understand her to be saying that there were several people inside the house?

A. I don't really think she knew. I think that she -- I think that she might have mentioned that she had heard some glass breaking or something, and she knew that somebody

was breaking in. I don't think that the plural form had any indication of her knowing.

J.A. 37-38 (emphasis added).

Hymon went around the near side of the house, his revolver drawn, while Wright went around the far side. Hymon reached the backyard first, where he heard a door slam and saw someone run from the back of the house. He located young Garner with his flashlight: Garner was crouched next to a six-foot cyclone fence at the back of the yard about 30 to 40 feet away from Hymon. See J.A. 30. From this vantage, Hymon was able to see one or both of Garner's hands. Compare J.A. 41 with J.A. 36.

The state and city both recite that Hymon could not tell whether Garner was armed. State's Brief at 3; City's Brief

at 4.[2] This canard is refuted by the record. Hymon testified that he was "reasonably sure that the individual was not armed." J.A. 41. On direct examination, the city's attorney asked Hymon: "Did you know positively whether or not he was armed?" J.A. 56 (emphasis added). He answered: "I assumed he wasn't...." Id.[3]

---

2 The City is less than candid with the Court. In its brief in the Sixth Circuit, it admitted that Garner "did not appear to be armed." Brief for Appellees at 7.

3 Hymon's conclusion that Garner was unarmed was based on several objective facts. Hymon noted that "had he been armed, I assume that he would have attempted to show that by firing a weapon, or I assume that he would have thrown it down, or I assume that I would have seen it." J.A. 41-42. He went on to explain: "I figured, well, if he is armed I'm standing out in the light and all of the light is on me the[n] I assume he would have made some kind of attempt to defend himself...." J.A. 56.

This conclusion is also corroborated by Hymon's actions. He did not warn his partner that the suspect might be armed, something he "definitely" would have done "if he had any question about whether this person was armed." J.A. 42. He did not fear for his personal safety either. Otherwise, as he admitted, "I would have taken more cover than what I had." Id. Rather, he knowingly remained in a position where "all of the light is on me" and where he was a superior target. J.A. 56.

While young Garner crouched in Hymon's flashlight beam, Hymon identified himself and ordered Garner to halt. Garner paused a few moments during which Hymon made no attempt to advance,[4] but continued to aim his revolver at Garner. The record leaves little doubt that, at this point, Hymon neglected the opportunity to apprehend Garner without resort to deadly force.

The city states as fact that "there were several obstacles, including a clothesline and other objects outlined in the dark, between the officer and the suspect, making pursuit almost certainly futile...." City's Brief at 4. But the record shows that the obstacles were insignificant. There was a three foot

---

4 Hymon testified that he did no more than take "a couple of steps," J.A. 51, "which wasn't, you know, far enough to make a difference." R. 256. Officer Wright testified that when he rounded the corner of the house after the shot, Hymon "was standing still...." J.A. 79.

chicken wire fence. J.A. 31. Chief Detective Dan Jones of the Shelby County Sheriff's Department, who inspected the site, testified that it was "no great distance in the first place, and the fence would have been very easy to get over ... for that officer or me either, because we're both tall." R. 296. See also R. 276-79, 294-95, 292. Hymon testified several times that, after he shot Garner, he stepped over the fence without problem. R. 245, 251, 651. As for the other obstacles, Hymon's testimony was unambiguous.

> Q. Once you started moving from the west side of the house over to the east and to the cyclone fence, how long do you think it took you?
>
> A. Well, it didn't take me long. I almost got my neck hung on the clothesline wire. It didn't take me very long, just a matter of ducking and moving around.

J.A. 58. In fact, his partner testified that after Hymon shot Garner, it only took Hymon "three or four seconds" to reach the body. J.A. 79.

While Hymon paused without giving chase, Garner bolted,[5] attempting to jump the fence. Hymon fired, striking young Garner in the head. Garner fell, draped over the fence. He did not die imme-

---

[5] Several record facts bear on Garner's attempt to escape. First, Garner had prior brushes with the law that, although minor, had been the occasion for discipline by his parents. At the age of 12, he and two other boys illegally entered the house in whose yard they were playing. J.A. 68. He was placed on probation for one year, id., and counseled and chastised by his father. J.A. 28. In June of 1974, he took a jar of pennies from a neighbor's house. Although the neighbor refused to call the police because the incident was so minor, the Garner family insisted and called the police themselves. R. 88-89; J.A. 70.

On the night of his death, Edward Eugene Garner's judgment was further impaired by the fact that he was intoxicated. The medical examiner testified that fifteen-year-old Garner had a blood alcohol content of .09%, just .01% under that set by Tennessee law as creating a presumption of intoxication for adults. J.A. 64; R. 461. According to the medical examiner, this is the equivalent of about four beers. R. 461.

diately; when the paramedics arrived on the scene "he was holding his head and just thrashing about on the ground," R. 141, "hollering, you know, from the pain." R. 137. Edward Eugene Garner died on the operating table. R. 153.

There was no one at home when the house was broken into. After the shooting, the police found that young Garner had ten dollars and a coin purse taken from the house. R. 737. The owner of the house testified that the only items missing were a coin purse containing ten dollars and a ring belonging to his wife, but that the ring was never found. The ten dollars were returned. J.A. 34-35.

Plaintiff called two expert witnesses -- Chief Detective Dan Jones of the Shelby County Sheriff's Department and Inspector Eugene Barksdale, former commander of the personal crimes bureau of the Memphis

Police Department -- to testify about the reasonableness of Hymon's use of deadly force. As the district court found:

> The substance of such testimony was to the effect that Hymon should first have exhausted reasonable alternatives such as giving chase and determining whether he had a reasonable opportunity to apprehend him in some other fashion before firing his weapon.

A. 8. Both Jones and Barksdale testified that Hymon "should have tried to apprehend him," R. 278, 375; Barksdale added that "in all probability he could have apprehended the subject without having to shoot him...." R. 373.[6]

B. The Proceedings Below

On April 8, 1975, Cleamtee Garner filed this action for damages for his son's death. J.A. 5. On August 18, 1975,

---

6 The only witness to testify that the officer was justified in using his gun was Memphis police Captain Collette, who had both trained Hymon and sat on the review board that condoned the shooting. R. 306, 307-09. Even so, his opinion was based on an assumption not supported by the facts: that Hymon was "physically barred from the area by a fence." R. 332.

the district court dismissed the City of Memphis and the Memphis Police Department as defendants under § 1983. After trial, the district court entered a memorandum opinion rendering judgment for the defendants.

Mr. Garner appealed. The court of appeals reversed and remanded the case for reconsideration in light of Monell v. Department of Social Services, 436 U.S. 658 (1978). One of the questions that it listed for consideration on remand was whether "a municipality's use of deadly force under Tennessee law to capture allegedly nondangerous felons fleeing from nonviolent crimes [is] constitutionally permissible under the fourth, sixth, eighth and fourteenth amendments?" Garner v. Memphis Police Dept., 600 F.2d 52, 55 (6th Cir. 1979); A. 18. It also remanded for consideration of the question of

Memphis's "policy or custom" for purposes of liability under Monell. 600 F.2d at 53; A. 19.

On remand, the district court denied plaintiff the opportunity to introduce additional evidence on the question of the Memphis "policy or custom," to submit an offer of proof, or to submit a brief on the merits; it entered judgment for the defendants. A. 20. On plaintiff's motion to reconsider, the court allowed the submission of a brief and offer of proof and then again entered judgment for the defendants. A. 31. The court of appeals reversed. It held that the Tennessee statute, Tenn. Code Ann. § 40-808 (1975), violated the fourth amendment and the due process clause "because it authorizes the unnecessarily severe and excessive, and therefore unreasonable," use of deadly force to effect the "arrest" of unarmed, nonviolent, fleeing felony suspects such

as plaintiff's son. 710 F.2d at 241; A. 40-41. Rehearing and rehearing en banc were denied on September 26, 1983. 710 F.2d at 240; A. 38.

C. The Memphis Policy: Liberal Use of Deadly Force

When Edward Eugene Garner was shot and killed on October 3, 1974, he was the one hundred and eighth (108th) non-violent property crime suspect shot at by Memphis police officers since January 1969. A. 1458-69. The record before the Court paints a picture of a police department that arms and trains its officers to shoot to kill, encourages them to rely on their revolvers rather than to exhaust other alternatives, and assures them that they may do so without guidelines and with impunity.

Because of the district court's decision not to allow further hearings on remand, the record on the question of the

Memphis policy or custom is a hybrid. It consists of the evidence adduced at the 1976 trial and the offer of proof tendered on remand.[7] But despite the nature of the record and the lack of findings below, it is clear that Memphis's use of deadly force to stop nondangerous suspects is extreme.

At the 1976 trial, plaintiff called Captain Colette, who was responsible for the department's recruit training and ammunition policies. He testified that, in the years immediately preceding the

7 Organized in fifteen parts, the offer of proof includes affidavits of expert witnesses who would have been called to testify, J.A. 81-125; excerpts from prior federal cases against the Memphis Police Department that eliminate Memphis's actual policies and customs regarding the use of deadly force, R. 799-1009, 1429-57, 1660-69, 1677-1687, 1814-1887; excerpts from the report of the Tennessee Advisory Committee to the U.S. Commission on Civil Rights, which was based on hearings on civil rights abuses by the Memphis Police Department, R. 1252-58; the deadly force policies of 44 major municipalities, R. 1108-1368; the training materials for the New York Police Department, R. 1369-1428; and an excerpt from an LEAA publication on deadly force that details police training procedures used in other cities but not in Memphis, R. 1460-93.

Garner shooting, Memphis twice upgraded its ammunition to bullets with greater velocity, accuracy, and predicted wounding power. R. 413-16, 425-27, 447. It finally selected the 125 grain, semi-jacketed, hollow-point Remington. Both Colette and the Shelby County medical examiner testified that this bullet is a "dum-dum" bullet banned in international use by the Hague Convention of 1899 because it is designed to produce more grievous wounds. R. 487-88, 572. This is the bullet that killed young Garner.

Colette also testified that Memphis recruits are taught to aim at the torso, or "center mass," where vital organs are more likely to be hit. R. 357-58. See also R. 1597, 1807-08.[8] Together with the

8 Captain Colette testified that the reason for teaching recruits to aim for the torso is not related to police safety; it did not create a better chance of neutralizing a dangerous suspect. R. 353-57. Rather, it is taught solely because the torso presents a greater target and thus reduces the chances of missing. R. 357-58.

use of "dum-dum" bullets, this creates a far greater risk that the resulting wound will be fatal. Indeed, in a prior case, the district court found that Memphis police officers "were trained whenever they use their firearms to 'shoot to kill.'" Wiley v. Memphis Police Dept., 548 F.2d 1247, 1250 (6th Cir. 1977).

The policies, practices, and customs of the Memphis Police Department encourage quick resort to the use of deadly force without a proper effort to exhaust other alternatives. Captain Coletta testified that the department used the film "Shoot - Don't Shoot," which presents only armed fleeing felons in its situational illustrations of the fleeing felon rule, R. 329-32;[9] that there was no training in

[9] The heavy reliance on the "Shoot-Don't Shoot" film encourages the use of firearms because, as plaintiff's expert Chief Bracey would have testified, it has a negative effect on an inexperienced recruit, making him jumpy and more likely to employ deadly force. J.A. 88.

alternatives that should be exhausted before resorting to deadly force to stop unarmed fleeing felony suspects, R. 340; that the department's firearms manual details firearms techniques, but not techniques to avoid the need for the use of weapons, R. 344-45; and that the use of deadly force to stop fleeing felony suspects is left to the individual officer's discretion: recruits are simply told that they must live with themselves if they kill a person. R. 326, 345; accord R. 195-96, 901, 956, 1797.

Moreover, the firearm training and ammunition policies of the department create the indelible impression on Memphis officers that the department encourages use of deadly force. Plaintiff's expert, Chief William R. Bracey,[10] explained that a

[10] At the time of his affidavit, William R. Bracey was Chief of Patrol of the New York Police Department with supervisory authority over all 17,500 uniformed personnel of the New York Police Department. He would also have testified: that guidelines and

"definite message was transmitted when [Memphis] reiterated its policy of shooting 'to stop' and at the same time introduced the use of dum-dum bullets. The message transmitted to line officers would seem to suggest the department's support of firearm use." J.A. 87.

Lest this policy not be clearly understood, Memphis takes two further steps to assure its officers that they may readily resort to deadly force: It provides outspoken and unquestioning public support for the shooter and

---

committed enforcement of those guidelines by the police hierarchy will lead to reductions in the use of unnecessary deadly force; that New York has reduced firearms discharges by 50% by these means; that the result of this reduction has been the increased safety of New York Police Department officers with fewer assaults on officers and fewer deaths; that law enforcement has been unhampered; that training, including training in alternatives to minimize the need for use of deadly force, and discipline are the keys to reducing unnecessary deadly force; that shooting unarmed fleeing felons is related to the officer's subjective notions of punishment; and that the Memphis policies of shooting fleeing property crime suspects, use of "dum-dum" bullets, and training and discipline were all deficient. J.A. 81-89.

resolutely refuses to discipline its officers for the use of their revolvers under any circumstances.

In January 1972, for example, fourteen-year-old Eddie Lee Madison, a black, was shotgunned in the back. He and a friend had stolen a car to joyride. They were stopped by the police at 11:00 P.M. in downtown Memphis. Eddie Madison bolted from the driver's side and ran. Neither officer gave chase down the virtually empty street. Both opened fire, despite the fact that the accomplice was already in custody and thus could have provided Madison's identity to the police. Five days later, the mayor issued a statement defending the shooting, saying that the officers' conduct was "in line with both previous policy and in line with any future policy that may be developed." R. 1632, 1825-28. Nevertheless, the mayor subsequently admitted in deposition that

he found the use of force in that situation excessive and that he amended the policy to prohibit such shootings. J.A. 108-114. See J.A. 140-44 (amended policy).[11]

Perhaps even more important is the Memphis policy never to discipline officers for the use of deadly force under any circumstances. No Memphis police officer has ever been disciplined for the use of his gun. R. 347, 1858. The civilian complaint procedures are designed to deter complaints. R. 1050-58.[12] And, as detailed in the record before the Court in Brandon v. Holt, No. 83-1622, various other policies of the department and the City Civil Service Commission result in a

[11] The Memphis policy was again amended in 1979 to prohibit the shooting of juveniles, like Nathson and Garner, except in defense of life. J.A. 120-21, 150.

[12] There is a rule that all complainants must take a polygraph while no officer is ever required to. The procedures also require that the officer against whom a charge is made must immediately be notified of the complainant's name and address. R. 1050-58.

disciplinary situation that, as characterized by former Director of Police Chapman, is best described as "hopeless." Brief for Petitioners, Elizabeth Brandon, et al., at 12-18.

As a result, Memphis officers get the clear message that they can use deadly force with impunity. The proximate result is the excessive use of deadly force in situations when it is not necessary in order to apprehend the subject. As the court of appeals noted in this case, Hymon shot young Garner pursuant to the Memphis policy "which allows an officer to kill a fleeing felon rather than run the risk of allowing him to escape apprehension." 688 F.2d at 34; A. 16.

B. The Memphis Custom: Racial Discrimination

On remand, respondent made an extensive proffer regarding the racial basis of the Memphis policy countenancing

the shooting of fleeing, nonviolent, property crime suspects. The offer of proof contains the raw data concerning all arrests in Memphis between 1963 and 1974, R. 1409-57, 1767-68; data on all shootings of fleeing property crime suspects between 1969 and 1974, R. 1460-69; data on all those killed by Memphis police officers between 1969 and 1976, R. 1764-67, 1071;[13] prior analysis of this data by a statistician, R. 1769-77, and his testimony at an earlier trial regarding this analysis, R. 1559-62, 1589-92; historical data regarding race discrimination by the Memphis Police Department from 1874 through the mid-nineteen-seventies, including the deposition testimony of the mayor and police director supporting this conclusion, R. 908-910; J.A. 116-19, 135-38; R.

13 All of the foregoing data was collected and provided by the Memphis Police Department as defendant in Wiley v. Memphis Police Dept., Civ. Action No. C-73-8 (W.D. Tenn. June 30, 1975), aff'd, 548 F.2d 1247 (6th Cir. 1977).

1539-40, 1571-75, 1646-56, 1677-78, 1690, 1828-29; and the affidavit of plaintiff's expert, Dr. James J. Fyfe,[14] which analyzed in detail the arrest and shooting data contained in the offer of proof. J.A. 97-106.

The data reveal that there are significant disparities in the use of deadly force based on the race of the shooting victim/suspect and that virtually all of this disparity occurs as the result of the Memphis policy that allows officers to exercise their discretion to shoot fleeing property crime suspects. Between 1969 and 1976, blacks constituted 70.6% of

14 Dr. Fyfe is a former New York Police Department lieutenant and training officer. He designed a firearms trainings program for the New York Police Department in which over 20,000 officers have participated. His doctoral thesis concerned the use of deadly force by New York Police Department officers. He is an associate professor at The American University in Washington, D.C., and has served as a consultant on the deadly force issue for the United States Department of Justice and the Civil Rights Commission. J.A. 97-99. He also teaches courses at the F.B.I. National Academy at Quantico, Va.

those arrested for property crimes in Memphis but 88.4% of the property crime suspects shot at by the Memphis police. In contrast, the percentage of black violent crime suspects shot at by Memphis police was closely proportionate to their percentage in the violent crime arrest population: 85.4% and 83.1%, respectively. R. 1773.

Dr. Fyfe reviewed this data and concluded that, controlling for differential racial representation in the arrest population, black property crime suspects were more than twice as likely to be shot at than whites (4.33 per 1000 black property crime arrests; 1.81 per 1000 white property crime arrests), four times more likely to be wounded (.586 per 1000 blacks; .1113 per 1000 whites), and 40% more likely to be killed (.63 per 1000 blacks; .45 per 1000 whites). J.A. 101-02.

Comparison of shootings by Memphis police officers while controlling for race of the shooting victim and the nature of the incident provided similarly striking data. Dr. Fyfe's analysis of the shooting incidents between 1969 and 1976 described by the Memphis Police Department to the Civil Rights Commission showed a dramatic disparity between the situations in which whites were killed and those in which blacks were killed. Of the blacks shot, 50% were unarmed and nonassaultive, 23.1% assaultive but not armed with a gun, 26.9% assaultive and armed with a gun. Of the whites shot, only one (12.5%) was nonassaultive, two (25%) were assaultive but not armed with a gun, and five (62.5%) were armed with a gun.[15]

[15] Dr. Fyfe noted that: "These are certainly dramatic differences, but no measure of their significance is possible ... because the only statistically significant category of whites killed is those armed with guns." J.A. 104.

Based on this data, Dr. Fyfe concluded that, during the period in question, Memphis police were far more likely to shoot blacks than whites in non-threatening circumstances and that the great disparity in blacks shot by Memphis police officers is largely accounted for by the policy allowing the discretionary shooting of non-dangerous fleeing felony suspects. Between 1969 and 1976, Memphis police killed 2.6 unarmed, non-assaultive blacks for each armed, assaultive white. J.A. 102-04.

The district court, in its post-reconsideration order, A. 31, rejected Dr. Fyfe's conclusions on the basis of several unsupportable considerations. It noted Dr. Fyfe's "bias," A. 34, without ever having seen him testify.[16] It

[16] The district court's "bias" finding was based on Dr. Fyfe's disagreement with the Memphis policy allowing the use of deadly force against non-dangerous suspects. This "bias," however, is the official policy of the F.B.I. and numerous metropolitan police departments as disparate as New York, Atlanta, and Charlotte, North Carolina. See R. 1113, 1200, 1293, 1869.

attacked Dr. Fyfe's conclusions because, it claimed, he failed to "specify the actual number of blacks arrested and/or convicted for alleged 'property crimes' as compared to whites during this period." A. 32. But, as discussed above, Dr. Fyfe's analysis specifically "controls for differential involvement among the races in property crime...," J.A. 101; indeed, the data on which Dr. Fyfe relied was included in the offer of proof and provided the actual number of both white and black property crime arrests together with the raw data of all arrests. R. 1409-57, 1767-68. The district court questioned the delineation of "'property crime' in the Fyfe definition." A. 32. But the delineation between property crimes and violent crimes that Dr. Fyfe employed was that made by the Memphis Police

Department and included with the arrest statistics. R. 1559, 1767-68. In numerous similar ways, the district court simply misapprehended Dr. Fyfe's proffered testimony.[17]

---

[17] For example, in questioning Dr. Fyfe's observation that the incidence of use of deadly force in property crime arrests in Memphis far exceeded that in New York, the district court noted that: "Professor Fyfe admitted his comparison was not 'precise' in respect to property crimes comparison." A. 32 n. 1. But Dr. Fyfe accounted for this imprecision in a way that favored Memphis. His "admission" was that:

> More than half (50.7 percent) of the police shootings in Memphis during 1969-1974 involved shooting at property crime suspects. The comparable percentage in 1971-1976 in New York was no more than 11.8 percent. This comparison is not precise because the New York City figure includes all shootings to "prevent or terminate crimes." Thus, it includes shootings precipitated by both property crimes and crimes of violence. My estimate of the percentage of New York City police shootings which involved property crime suspects only is four percent.

J.A. 100.

Similarly, in arguing that Dr. Fyfe failed to control for disparate racial involvement in the underlying felonies, the district court alleged that Dr. Fyfe "concedes elsewhere that there is also 'differential racial involvement in police shootings.'" A. 32. What Dr. Fyfe said, however, is that: "In New York City, differential racial

Moreover, the district court failed to consider that the historical background of the Memphis Police Department corroborates the inference of discrimination that arises from the statistics. The department's history is one of entrenched racism in employment, promotion, and law enforcement.[18] The department was repeatedly the agent of enforcement of the segregation laws in the 60's, R. 1539-40, engaging in racial abuse and brutality during the sanitation strike in 1968. R. 1571-75. A 1970 NAACP Ad Hoc Committee Report concluded that: "the most common form of address by a Memphis policeman to a black

---

involvement in police shootings also exists, but [unlike Memphis] it is almost totally accounted for by differential racial involvement in the types of activities likely to precipitate shootings." J.A. 101-02.

[18] As long ago as 1874, a "Resolution asking Police Board to put 20 colored men on force, lost by vote 16-3" before the City Council. R. 1646.

person appears to be 'nigger.'" R. 1671. As acknowledged by Director Chapman, "the 'Hey, boy' syndrome ... lasted [in the Memphis police department] longer, but lasted there only because it was perceived by the department as being accepted by the majority of this community." J.A. 136. This was still true in 1974, when Garner was shot.[19]

In 1974, blacks made up only 10% of the force and only 3.1% of the officers over lieutenant (there were no blacks higher than captain) in a city that was almost 40% black. R. 169. See also R.

---

19 As the mayor testified:

> The black community, speaking generally and in a broad sense, perceives the police department as having consistently brutalized them, almost their enemy instead of their friend.... [T]alking about in 1972, what you say is absolutely true and I would say almost across the board.

R. 1828-29; accord J.A. 118-119 (police director testified that: "There is a basis in fact for the distrust of the black community.... Q. And 1974? A. Absolutely.").

910; J.A. 136.[20] This isolated minority conformed its behavior to the departmental ethic; as director Chapman testified in 1979, he "had equal problems with the black officers in terms of the black officers trying to out red-neck the white officers.... I mean that's literally [sic] what we had." J.A. 137.

SUMMARY OF ARGUMENT

This case is not about the power "to use whatever force is reasonably necessary to effect the arrest of a suspect," State's Brief at 14, nor "to lawfully use deadly force to apprehend." City's Brief at 14. Rather, it is about the ability of the police to use force that is intended and likely to result in death to prevent the escape of unarmed, nonviolent, and

---

20 That same year, an employment discrimination lawsuit brought by the Department of Justice was settled. The consent decree was designed to increase the hiring and promotion of black officers. United States v. City of Memphis, Civ. Action No. C-74-286 (W.D. Tenn. 1974).

nondangerous fleeing felony suspects when the officer believes that he cannot effect an arrest: in short, "if the killing of a non-violent fleeing felony suspect deprives the suspect of constitutional guarantees." State's Brief at 18. It does. Whether analyzed in terms of the fourth amendment, the right not to be deprived of life without due process, or the prohibition of punishment without due process, the taking of life under these circumstances is disproportionate to and excessive in light of the state interests asserted in justification. While the common law fleeing felon doctrine may have made sense at the time of its development and, even, as late as the nineteenth century, modern conditions have rendered the practice unreasonable and excessive. A majority of the states and the overwhelming majority of municipal police departments have recognized this and

modified or abandoned the practice.

The Court should also affirm on the basis of either of two alternative grounds that support the judgment below. The deadly force policies and customs of the Memphis Police Department encourage and insulate the excessive and unnecessary use of deadly force in situations, such as the instant case, where the officer has failed to exhaust reasonable alternatives. Independent of the constitutionality of the common law fleeing felon doctrine, this municipal policy violates the fourth amendment and the due process clause. Moreover, the Memphis policy that leaves the decision to shoot unarmed, nonviolent, fleeing property crime suspects to the discretion of the individual officer is racially discriminatory.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY BALANCED THE NATURE OF THE INTRUSION AGAINST THE STATE'S INTERESTS IN LAW ENFORCEMENT AND HELD THAT THE KILLING OF AN UNARMED, NONVIOLENT, FLEEING PROPERTY CRIME SUSPECT VIOLATES THE CONSTITUTION

The question in this case is whether a state or city may authorize its police to kill a fleeing suspect whom the officer reasonably believes to be unarmed when the officer has probable cause to believe that the suspect committed a nonviolent felony such as burglary but feels that he cannot capture him. Whether analyzed under the fourth amendment or the due process clause, the answer ultimately depends on the relationship between the nature of the intrusion inflicted upon the suspect and the state interests asserted in justification. The court of appeals assessed this balance correctly. The use of deadly force in these circumstances is

excessive and disproportionate -- that is, the asserted state interests are not substantial enough to justify the taking of the life of a nonviolent, fleeing felony suspect.

In the sections that follow, we discuss the appropriate analysis under each of three alternative constitutional theories. Section A discusses the fourth amendment. Section B considers the due process clause's protection of life. Section C evaluates the fleeing felon doctrine in light of the fourteenth amendment's protection against punishment without due process. Finally, section D assesses the balance of interests required by each of these analyses.

A. The Fourth Amendment Requires a Balancing of the Interests

The city argues that the court of appeals erred because the fourth amendment does no more than set the minimum standard

for initiating an arrest -- i.e., probable cause -- and does not control what the police may do in effectuating that arrest. City's Brief at 13. Similarly, the state argues that the common law fleeing felon rule satisfies the fourth amendment because it protects against arbitrary or unnecessary police action. State's Brief at 10-11. It also raises additional arguments why the rule satisfies the fourth amendment. As we show below, the state and the city are wrong on each of these points; decision in this case will turn on the balancing required by the fourth amendment.[21]

---

21 Both the state and the city concede this point in the end. The state admits that "'the reasonableness' under the Fourth Amendment of the seizure of a person appears to have traditionally been evaluated in terms of whether ... the magnitude of the action was necessary in relation to the state interest served by the police conduct...." State's Brief at 10 (citing Terry v. Ohio, 392 U.S. 1 (1968)). Similarly, the city admits that, if a fourth amendment analysis is appropriate, "the court must then look to the rule of reasonableness established by Terry [and] identify both the governmental interest involved which would justify the use of deadly force and the effect such use would have upon individual rights. Then the Court must balance the two competing interests...." City's Brief at 13.

First, the Tennessee practice at issue is governed by the fourth amendment. It speaks directly to "[T]he right of the people to be secure in their persons ... against unreasonable ... seizures...." U.S. Const. amend. IV; Terry v. Ohio, 392 U.S. 1, 16 (1968); United States v. Place, ___ U.S. ___, 77 L.Ed.2d 110, 121-22 (1983); Dunaway v. New York, 442 U.S. 200, 207 (1979); Cupp v. Murphy, 412 U.S. 291, 294 (1973); Davis v. Mississippi, 394 U.S. 721, 726-27 (1969). As the court of appeals observed: "Killing the individual ... is plainly a 'seizure.'" 710 F.2d at 243; A. 44.

Moreover, the Court has long repudiated the contention that the fourth amendment governs only the "when" of police action and not the "how." The

Court only recently reaffirmed what it "observed in Terry, '[t]he manner in which the seizure ...[was] conducted is, of course, as vital a part of the inquiry as whether [it was] warranted at all.'" United States v. Place, 77 L.Ed.2d at 121 (quoting Terry, 392 U.S. at 28).[22] In Place, the Court went on to "examine the agents' conduct...," id., and found it "sufficient to render the seizure unreasonable."[23] Id. at 122.

---

22 In Terry, the Court added that: "The Fourth Amendment proceeds as much by limitations upon the scope of governmental action as by imposing preconditions upon its initiation." 392 U.S. at 28-29.

23 See also Schmerber v. California, 384 U.S. 757, 768 (1966) ("whether the means and procedures employed ... respected relevant Fourth Amendment standards of reasonableness"); Ker v. California, 374 U.S. 23, 38 (1963) (whether "the method of entering the home may offend federal constitutional standards of reasonableness"); United States v. Calandra, 414 U.S. 338, 346 (1974) (subpoena "'far too sweeping in its terms to be regarded as reasonable' under the Fourth Amendment") (dicta); Dalia v. United States, 441 U.S. 238, 258 (1979) ("the manner in which a warrant is executed is subject to later judicial review as to its reasonableness").

But if the city is incorrect in its assertion that the fourth amendment only governs when police can arrest, the state is equally wrong in its assertion that it only provides protection from arbitrary and unnecessary, but not excessive, police actions. In every fourth amendment context, the Court has considered the reasonableness of police actions by measuring the extent of the intrusion against the asserted justifications. Thus, in Terry the Court observed that: "The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." 392 U.S. at 19 (quoting Warden v. Hayden, 387 U.S. 294, 310 (1967) (Fortas, J., concurring)). In Florida v. Royer, 460 U.S. ____, 75 L.Ed.2d 229 (1983), the Court noted that a "search must be limited in scope to that which is justified by the particular purposes served...." Id. at

238. "The reasonableness requirement of the Fourth Amendment requires no less when the police action is a seizure.... The scope of the detention must be carefully tailored to its underlying justification." Id. See also Michigan v. Summers, 452 U.S. 692, 701-02 (1981) (gauging nature of the intrusion).

Thus, in determining the reasonableness of the use of deadly force under the fourth amendment, the court of appeals followed exactly the mode of analysis applied by this Court in considering other forms of police action.

> Terry and its progeny rests on a balancing of the competing interests to determine the reasonableness of the type of seizure involved within the meaning of "the Fourth Amendment's general proscription against unreasonable searches and seizures." 392 U.S. at 20. We must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.

United States v. Place, 77 L.Ed.2d at 118. Accord United States v. Villamonte-Marquez, ___ U.S. ___, 77 L.Ed.2d 22, 30 (1983).

The "nature and quality of the intrusion" in this case were incomparably severe. As the court of appeals noted, young Garner was "seized" permanently and irrevocably. 710 F.2d at 245; A. 44. Moreover, the physical assault of the shooting was itself an intrusion on fourth amendment interests. As noted in Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970), on which the court of appeals relied, 710 F.2d at 245; A. 50, the fourth amendment "shield covers the individual's physical integrity;" it protects the "inestimable right of personal security." Id., 424 F.2d at 1232 (quoting Terry v. Ohio, 392 U.S. at 8-9); accord Florida v. Royer, 75 L.Ed.2d at 238; Davis v.

Mississippi, 394 U.S. at 726-27 ("Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry...."); see Schmerber v. California, 384 U.S. at 767 ("we are dealing with intrusions into the human body").[24]

---

24 Every circuit has concurred in this conclusion, although most now follow the Second Circuit's lead as articulated by Judge Friendly in Johnson v. Glick, 481 F.2d 1028 (2d Cir.), cert. denied, 414 U.S. 1033 (1973), that "quite apart from any 'specific' of the Bill of Rights, application of undue force by law enforcement officers deprives a suspect of liberty without due process of law." Id. at 1032; accord Landrigan v. City of Warwick, 628 F.2d 736, 741-42 (1st Cir. 1980) (citing United States v. Villarin Garena, 553 F.2d 723, 728 (1st Cir. 1977) (Fourth and Fifth Amendments)); Howell v. Cataldi, 464 F.2d 272 (3rd Cir. 1972); United States v. Stokes, 506 F.2d 771, 775-76 (5th Cir. 1975); Tefft v. Seward 689 F.2d 637, 639 n.1 (6th Cir. 1982); Byrd v. Brishke, 466 F.2d 6 (7th Cir.1972); Herrera v. Valentine, 653 F.2d 1220, 1229 (8th Cir. 1981); Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974); Morgan v. LaVien, 368 F.2d 358 (10th Cir. 1966); Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971), rev'd on other grounds, 409 U.S. 418 (1973).

The argument that Jenkins is inapposite, City's Brief at 8, 12-13, is thus incorrect. Jenkins was not premised on the lack of probable cause to arrest. Rather, the vice it found was that "our

Thus, the Court must balance a uniquely harsh intrusion on young Garner's fourth amendment interests against the state's asserted justifications. The state seeks to avoid this analysis by two additional fourth amendment arguments. First, it argues that the fleeing felon doctrine has historical sanction because it coexisted with the adoption of the fourth amendment. State's Brief at 9. Second, it argues that the balance entertained by the court of appeals "is both unprecedented and unwarranted" because it measures the police action by the gravity of the underlying crime. Id. at 10. We dispose of each of these in turn.

---

plaintiff was subjected to the reckless use of excessive force." 424 F.2d at 1232 (emphasis added). The city quotes but does not cite the Jenkins panel's observation that "no force was needed to restrain Jenkins." City Brief at 13. But it fails to disclose that this quote comes from the discussion of the state law claim and was not part of the court's constitutional analysis. Compare 424 F.2d at 1232 with id. at 1231.

(1) The common law basis of the doctrine no longer supports the reasonableness of shooting all fleeing felons:

At common law, felony usually referred only to crimes punishable by death. "[T]he idea of felony is indeed so generally connected with that of captial punishment, that we find it hard to separate them." 4 W. Blackstone, COMMENTARIES 98 (1800). In its early development, the statutory law of Tennessee largely assimilated this common law norm. When Tennessee codified the fleeing felon doctrine in 1858, and during the period following enactment of the fourteenth amendment, the Tennessee code prescribed the death penalty for a large number of crimes. Pub. Stats. of Tenn. §5 (Supp. 1858-1871). But as the nineteenth century proceeded, the felony label became attached to a broadening array of non-capital crimes. Comment, Deadly Force

to Arrest: Triggering Constitutional Review, 11 Harv. Civ.R.-Civ.Lib.L.Rev. 361, 366-67 (1974).

As long as many felonies were capital, authorizing deadly force to stop fleeing felony suspects was not without its logic. For a suspect fleeing a death penalty could be assumed to be a desperate person, motivated to resist arrest by all possible means.[25] But the days have long since passed when "[t]o be a suspected felon was often as good as being a dead one." T. Taylor, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 28 (1969). Crimes once considered capital offenses are no longer so viewed. The use of the death penalty has been severely curtailed so that it is available only for crimes causing loss of life under special,

---

25 This is reflected in the Tennesse statute, which is entitled "Resistance to Officer" and authorizes the use of deadly force if the suspect "either flee or forcibly resist...." Tenn. Code. Ann. §40-808.

aggravating circumstances. See Gregg v. Georgia, 428 U.S. 153 (1976); Coker v. Georgia, 433 U.S. 584 (1977).

Moreover, the doctrine developed in an age when there existed virtually no communication between law enforcement personnel in different towns and cities. Thus, the escaping suspect could easily establish a new life in another community with little fear of discovery and eventual capture. But, by the eighteenth century, authorities were circulating descriptions of wanted criminals outside of London. And, by the early twentieth century, American police officers consulted their colleagues in other cities about thieves and their whereabouts. Sherman, Execution Without Trial: Police Homicide and the Constitution, 33 Vand.L.Rev. 71, 76 (1980); Comment, Deadly Force, supra, 11 Harv.Civ.R.-Civ.Lib.L.Rev. at 361. The development of modern police agencies

armed with sophisticated means of communication has further reduced the common law justification for the doctrine.

So have technological advances in weaponry. During the early years of the doctrine, weaponry was limited to armaments wielded by hand -- swords, farm tools, and halberds. And even after the invention of the musket, its inconvenience and inaccuracy prevented police use of ballistic weapons. Sherman, supra, 33 Vand.L.Rev. at 75. In this technological context, the practical meaning of the doctrine was that suspects could be killed if they resisted arrest in a hand-to-hand struggle; it did not mean that they could be killed from a distance while they were in flight. These practical considerations were decisively changed by the widespread use of revolvers, beginning in the 1850's. C. Kennet and J. Anderson, THE GUN IN AMERICA 22 (1975). For accurate and

powerful handguns allowed, and continue to allow, the police to kill fleeing suspects who pose no immediate threat to anyone.

Thus, the original premises that made the fleeing felon doctrine reasonable at the time the fourth amendment was adopted are no longer applicable. History, like the fourth amendment, is not static. See, e.g., Payton v. New York, 445 U.S. 573, 598 (1980)("the issue is not one that can be said to have been definitively settled by the common law at the time the fourth Amendment was adopted"). As one court observed, "the historical foundation of American state fleeing-felon statutes is a foundation built on loose sand." Taylor v. Collins, 574 F.Supp. 1554, 1558 (E.D.Mich. 1983). A dangerous anachronism, the doctrine should be consigned to the history that produced it.

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the

> grounds upon which it was laid down have vanished long since and the rule simply persists from blind imitation of the past.

Holmes, The Paths of the Law, 10 Harv. L.Rev. 457, 469 (1897).

(2) The Tennessee statute's disregard of the gravity of the underlying offense is a proper consideration under the fourth amendment:

The state charges that the court of appeals erred in judging the reasonableness of the seizure on the basis of the gravity of the underlying crime, asserting that this analysis "is both unprecedented and unwarranted." State's Brief at 10. But what the court of appeals actually did was look at the underlying offense to assess the nature of the state's interest in killing the fleeing felon rather than allowing his escape.

> A state statute or rule that makes no distinctions based on the type of offense or the risk of danger to the community is inherently suspect because it permits an unnecessarily

> severe and excessive police response that is out of proportion to the danger to the community.

Garner, 710 F.2d at 244; A. 48. The statute's failing is its sweeping authorization of discretion to shoot the fleeing thief along with the fleeing murderer, which cannot be justified by public safety concerns that would support a more narrowly drawn statute.

This analysis is hardly unprecedented. In considering the warrantless entry in McDonald v. United States, 335 U.S. 451 (1948), Justice Jackson's concurring opinion noted that:

> Whether there is reasonable necessity for a search without waiting to obtain a warrant certainly depends somewhat upon the gravity of the offense thought to be in progress.... It is to me a shocking proposition that private homes, even quarters in a tenement, may be indiscriminately invaded at the discretion of any suspicious police officer engaged in following up offenses that involve no violence or threats of it.

Id. at 459. The Chief Justice has similarly observed that:

> Freeing either a tiger or a mouse in a school room is an illegal act, but no rational person would suggest that these two acts should be punished in the same way. From time to time judges have occasion to pass on regulations governing police procedures. I wonder what would be the judicial response to a police order authorizing "shoot to kill" with respect to every fugitive. It is easy to predict our collective wrath and outrage. We, in common with all rational minds, would say that the police response must relate to the gravity and need; that a "shoot" order might conceivably be tolerable to prevent the escape of a convicted killer but surely not for a car thief, a pickpocket or a shoplifter.

Bivens v. Six Unknown Agents, 403 U.S. 388, 419 (1971) (Burger, C.J., dissenting).

The Court's recent decision in Welsh v. Wisconsin, ___ U.S. ___, 80 L.Ed.2d 732 (1984), lays to rest any doubt on this score. Welsh

> conclude[d] that the commonsense approach utilized by most lower courts is required by the Fourth

> Amendment prohibition on "unreasonable searches and seizures," and h[e]ld that an important factor to be considered ... is the gravity of the underlying offense for which the arrest is being made.

Id. at 745.

In sum, the court below properly analyzed the Tennessee statute under the fourth amendment. It assessed the nature of the intrusion, the gravity of the underlying offense, and their relationship to the nature of the state's justification for its policy. As we show in section D below, it also struck the correct constitutional balance.

B. The Deprivation of Life Must be Justified by Countervailing State Interests

Edward Eugene Garner was shot and killed by a Memphis police officer. "The deceased's interest in life plainly was of constitutional dimension. U.S. Const. amend. XIV, § 1." Williams v. Kelly, 624 F.2d 695, 697 (5th Cir. 1980). Since life

is a "fundamental" right,[26] its deprivation "may be justified only by a 'compelling state interest' ... and ... legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." Roe v. Wade, 410 U.S. 113, 155 (1973). See also Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Stanley v. Illinois, 405 U.S. 645 (1972). Thus, the state must demonstrate the existence of interests equiva-

---

26 The right not to be deprived of life without due process is explicitly guaranteed by the Constitution and is inherent in the constitutional framework. See, e.g., Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) ("the fundamental rights to life, liberty and the pursuit of happiness"); Johnson v. Zerbst, 304 U.S. 458, 462 (1938) ("fundamental human rights of life and liberty"); Screws v. United States, 325 U.S. 91, 131, 152 (1945) (Rutledge, J., concurring) (life is among the "clear-cut fundamental rights"); id. at 134-35 (Murphy, J., dissenting) ("He has been deprived of the right to life itself.... That right was his because he was an American citizen, because he was a human being. As such, he was entitled to all the respect and fair treatment that befits the dignity of man, a dignity that is recognized and guaranteed by the Constitution."); May v. Anderson, 345 U.S. 528, 533 (1953) (a right "far more precious than ... property rights").

C. The Prohibition Against Punishment without Due Process Also Requires Consideration of State Interests Asserted in Justification

In both the district court and the court of appeals, plaintiff advanced another, established principle of due process that invalidates the Tennessee statute. The fourteenth amendment provides every person with "protection against punishment without due process of law.... For under the due process clause, a [person] may not be punished prior to an adjudication of guilt in accordance with due process of law." Bell v. Wolfish, 441 U.S. 520, 535 (1979); accord Ingraham v. Wright, 430 U.S. 651, 671-72 n. 40 (1977); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 165-67 (1963). The shooting of Edward Eugene Garner violated the due process clause because it "amount[ed] to punishment." Wolfish, 441 U.S. at 535.

lent to or otherwise sufficient to counterbalance the right that is curtailed -- i.e., the use of deadly force must not be excessive. Williams v. Kelly, 624 F. 2d at 697-98; Johnson v. Glick, 481 F.2d 1028, 1031-33 (2d Cir. 1973); Ayler v. Hopper, 532 F.Supp. 198 (M.D. Ala. 1981); Jacobs v. City of Wichita, 531 F.Supp. 129 (D.Kan. 1982).[27]

The court of appeals applied these principles to assess the constitutionality of the Tennessee fleeing felon statute. 710 F.2d at 246-47; A. 52-53. As under the fourth amendment, they require a careful balancing of the deprivation inflicted against the state interests asserted to support the drastic measure of deadly force.

---

27 Ayler and Jacobs both held the common law fleeing felon doctrine unconstitutional, belying the assertion that Garner is the first and only case to have done so. State's Brief at 14; City's Brief at 7, 11.

A "court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." Wolfish, 441 U.S. at 538. In Wolfish, the Court cited the seven Mendoza-Martinez criteria as "useful guideposts" for making that determination:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment -- retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned....

Mendoza-Martinez, 372 U.S. at 168-69 (footnotes omitted). The application of these seven criteria overwhelmingly points in only one direction: The use of deadly

force to apprehend an unarmed fleeing felony suspect is, in purpose and effect, punishment.

1) The imposition of death is the ultimate "affirmative disability or restraint," depriving the victim of "the right to have rights." Furman v. Georgia, 408 U.S. 238, 290 (1972) (Brennan, J., concurring). See also Screws v. United States, 325 U.S. 91, 188 (1945) (Rutledge, J., concurring); Woodson v. North Carolina, 428 U.S. 280, 323 (1976) (Rehnquist, J., dissenting).

2) The historical underpinnings of the doctrine demonstrate that the shooting of fleeing felons was regarded as punishment. As late as the 15th century in England and the 18th century in America, all felonies -- murder, rape, manslaughter, robbery, sodomy, mayhem, burglary, arson, prison break, and larceny -- were punishable by death; the fleeing

felon doctrine merely accelerated the penal process.[28] Early commentators described "the extirpation [as] but a premature execution of the inevitable judgment...."[29] "His killing was at best an extrajudicial and premature execution of a penalty which he had already incurred by his felony."[30] Moreover, the fleeing felon doctrine grew out of an era when summary execution was well ensconced in the law.

> Thieves were often killed outright during the hue and cry, even after they had been captured. "Let all go forth where God may direct them to go," urged the tenth-century laws of Edgar; "let them do justice on the thief." Suspicion sufficed to convict

28 Comment, Deadly Force to Arrest: Triggering Constitutional Review, 11 Harv. Civ. Rights-Civ. Lib. L. Rev. 361, 365 (1974); R. Perkins, CRIMINAL LAW 10 (2d ed. 1969).

29 Note, Legalized Murder of a Fleeing Felon, 15 Va. L. Rev. 582, 583 (1929). See also Note, The Use of Deadly Force in Arizona by Police Officers, 1972 L. & Soc. Order 481, 482 ("It made little difference if the suspected felon were killed in the process of capture, since, in the eyes of the law, he had already forfeited his life by committing the felony.")

30 Bohlen & Schulman, Arrest With and Without a Warrant, 75 U.Pa.L.Rev. 485, 495 (1927).

> thieves without any trial at all, and "execution in such cases often followed immediately on arrest." According to the preamble to Act 24 of Henry VIII, it appears that the common law authorized the victims of crimes and attempted crimes to kill the criminal, regardless of whether it was necessary to prevent the felony....In the context of the times in which the kill-to-arrest doctrine evolved, it was clearly linked to a philosophy of summary justice that can only be viewed as punishment.

Sherman, supra, 33 Vand.L.Rev. at 81 (footnotes omitted).

Even after the adoption of the fourteenth amendment, the fleeing felon doctrine was regarded as punishment. Judge (later Justice) Brown said:

> I doubt, however, whether this law would be strictly applicable at the present day. Suppose, for example a person were arrested for petit larceny, which was a felony at the common law, might an officer under any circumstances be justified in killing him? I think not. The punishment is altogether too disproportioned to the magnitude of the offense.

United States v. Clark, 31 Fed. 710, 713 (C.C.E.D. Mich. 1887) (emphasis added). Thus, historically, the shooting of a fleeing felony suspect has always been regarded as punishment.

3) & 5) A "finding of scienter" is made by the police officer in his determination that there is a "reasonable suspicion," J.A. 141, that the fleeing suspect committed a felony with its scienter requirement. That felony is already a crime;[31] although there is some doubt about which crime the victim is being shot for,[32] "we are in fact killing

---

31 Burglary is prohibited by Tenn Code. Ann. § 39-3-401 (1975). Flight is not a statutory crime, but it was a crime at common law. See n.32, infra. Memphis City Code § 30-15 makes it "unlawful" for any person "to escape from ... any officer or member of the police force." Violation of this section which prescribes no penalty, is subject to a maximum fine of $50. See Memphis City Code § 1-8.

32 As cogently argued by Professor Mikell:

> May I ask what we are killing him for when he steals an automobile and runs off with it? Are we killing him for stealing the automobile? ... If we catch him and try him ..., what do we do

> to him? Put him before a policeman and have a policeman shoot him? Of course not. We give him three years in a penitentiary. It cannot be then that we allow the officer to kill him because he stole the automobile, because the statute provides only three years in a penitentiary for that. Is it then for fleeing? And again I insist this is not a question of resistance to the officer. Is it for fleeing that we kill him? Fleeing from arrest is also a common law offense and is punishable by a light penalty, a penalty much less than that for stealing the automobile.
>
> 9 A.L.I. PROCEEDINGS 186-87 (1931), quoted in J. Michael & H. Wechsler, CRIMINAL LAW AND ITS ADMINISTRATION 80-82 n. 3 (1940).

the ... thief for the volatile combination of felony and flight, both of which are crimes." Sherman, supra, 33 Vand.L.Rev. at 84.

4) The doctrine promotes the traditional aims of punishment -- retribution and deterrence. It was historically viewed as merely accelerating punishment in an era when retribution (as contrasted with rehabilitation) was the primary goal of the penal law. The courts themselves have indicated the retributive nature of this sanction. In discussing the Tennessee

fleeing felon rule in Wiley, the panel cited the observation of the dissent in Mattis v. Schnarr, 547 F.2d 1007, 1023 (8th Cir. 1976), vacated on case and controversy grounds sub nom. Ashcroft v. Mattis, 431 U.S. 171 (1977): "There is no constitutional right to commit felonious offenses and escape the consequences of those offenses." Wiley, 548 F.2d at 1253. The "consequences" of criminal conduct are punishment.[33]

Whether the shooting of fleeing felony suspects actually has a deterrent effect, the record indicates that Memphis intends it for this purpose. Based on the

[33] This line of reasoning assumes the guilt of the fleeing felony suspect. But flight is not necessarily an index of guilt; it is equally likely to be the result of immaturity. See Eddings v. Oklahoma, 455 U.S. 104, 115-116 n.11 (1982) ("adolescents ... are more ... impulsive [and] may have less capacity to control their conduct and think in long range terms than adults"). Thus, many of the prior cases have involved minors as victims. See, e.g., Wiley, supra; Quelle v. Parish, 534 F.2d 690 (6th Cir. 1976); Mattis, supra; Jones v. Marshall, 528 F.2d 132 (2d Cir. 1975).

testimony of Mayor Chandler and Police Director Hubbard, defendants in this action whose testimony is in the record, R. 1832-33 (Mayor: "Q. Do you think the policy acts as a deterrent? A. That is the purpose."), 1848-50 (Police Director Hubbard: "I feel [it] has to be regarded as some kind of deterrent to serious crime."); see also J.A. 122-23 (Police Director Chapman), the district court in Wiley found

> that one of the principal purposes of Memphis' policy regarding use of deadly force insofar as they attempt to justify the possible death of fleeing burglary suspects, is to deter criminal conduct.

Wiley v. Memphis Police Department, Civ. Action No. C-73-8, Mem.Op. at 13 (W.D. Tenn. June 30, 1975).[34] This subjective

[34] In this Court, the city echoes the Wiley panel and the Mattis dissent in noting that the fleeing felony suspect should pay for his crime: "There is no constitutional right to commit felonious offenses and to escape the consequences of these offenses." City's Brief at 15. Both the city's and the state's briefs suggest the deterrence rationale elsewhere as well. City's Brief at 14, 15 (ability to kill

intent to punish suffices to invalidate the policy. Wolfish, 441 U.S. at 538; Mendoza-Martinez, 372 U.S. at 169.[35]

6) & 7): Absent this punitive intent, a sanction may avoid the inference that it is a punishment if "an alternative purpose to which it may rationally be connected is assignable for it and ..." it does not appear "excessive in relation to the alternative purpose...." Mendoza-

---

notifies the "criminal that flight is not an option"); State's Brief at 19 (power to shoot "enhances the likelihood that suspects will submit to arrest").

[35] Chief Bracey's testimony offered below includes the observation that:

> From my experience it seems that shooting a fleeing felony suspect is mostly related to an officer's urge to punish a criminal. This instinct for punishment is especially strong when the suspect is thought to have just committed a violent crime. Much of the resistance we faced when the Department tightened its deadly-force regulations was grounded in the feeling that criminals deserved no chance of escaping punishment and that the punishment of being shot when fleeing from a police officer was not excessive.

J.A. 87.

Martinez 372 U.S. at 168-69. Analysis of possible alternative purposes, as well as the professed deterrent aim, follows.

D. A Balancing of the Interests Demonstrates that the Fleeing Felon Doctrine is Unconstitutional

At the outset, the Court should be clear about the interests at stake. This case is not about the right to escape; it does not concern shooting to wound[36] or the use of less than lethal force to apprehend, restrain, or subdue a fleeing suspect.[37] Memphis policy and Tennessee law

---

[36] Captain Colette testified that recruits were taught to aim for the torso because it presents a greater target and thus reduces the chances of missing. R. 357-58. When asked whether he could or would teach recruits the marksmanship necessary to be able to shoot and hit a person's extremities, Captain Colette said: "Certainly I would." R. 352. He went on to say, however, that he did not have the time, budget, or recruit talent to do it successfully. R. 352-53. Some other municipalities provide guidelines to their officers governing when to shoot to kill and when to shoot to wound. R. 1303-04. See also R. 1319.

[37] The alternatives to deadly force in this situation are numerous. As Chief Bracey testified:

> Using a radio to summon assistance is nearly always correct tactically. With a quick call

armed the officer with a gun, supplied him with dum-dum bullets designed to inflict more lethal injuries, taught him to shoot at the torso where viscera are more likely to be hit, and authorized him to shoot from less than 40 feet away without even

---

for assistance, a fleeing suspect can be eventually caught even if he does manage to escape temporarily. Or if the suspect is unarmed, moving up on him quickly with a drawn night-stick and an air of determination will do wonders toward halting a suspect thinking about fleeing. The point is that in most cases there are alternatives to deadly force if officers are expected and trained to reach for these options.

J.A. 89. Accord R. 278-79 (Chief Detective Jones); R. 376-77 (Inspector Barksdale). Modern technology also provides options such as rubber bulletsand tranquilizer guns, for example. Increasingly, police departments are looking for alternatives.

> Local governments have been turning to the Justice Department's Community Relations Service for help.... The sessions stress techniques that prevent the use of force by police in the first place.... Some police departments are being taught new ways to capture suspects -- the use of a heavy net, for example, rather than a gun.

"Magnum Force, Massive Lawsuits (More and More Communities Urge Police to Show Restraint)," The New York Times, April 8, 1984, p. 2 E, col. 4.

attempting to give chase. They empowered him to do so without regard to the fact that he had already concluded that Garner was unarmed, J.A. 41, 56, and without regard to the dangerousness of the underlying offense. This is the "police order authorizing 'shoot to kill' with respect to every fugitive" identified by the Chief Justice in Bivens. 403 U.S. at 411. See discussion supra at 16.

In support of this, the state and the city advance an array of interests that are only compelling on the surface. As expressed in the briefs, they are "effective law enforcement, the apprehension of criminals, the prevention of crime, and protection of the general public." State's Brief at 17, 18; City's Brief at 14. But these interests do not withstand scrutiny when viewed in light of the actual policies and practices that they are asserted to justify. The use of deadly

force to stop unarmed, nonviolent fleeing felony suspects is both arbitrary and excessive in light of each of these asserted justifications.

(1) Apprehension of the suspect: The fleeing felon doctrine is inherently excessive in light of this purpose. A Memphis officer who uses his gun "to apprehend" shoots to kill, contemplating that either death or serious bodily injury will result. If he is successful, no apprehension will take place.

Analysis of the purposes of apprehension illustrates the excessiveness of deadly force employed to "effect an arrest." Tenn. Code Ann. § 40-808 (1975). As the city acknowledges: "The police officers who are in pursuit of a fleeing felon have [a] duty to apprehend him as the first step of our criminal law process." City's Brief at 16. But for

young Garner, it was the first and final step.

Normally, we apprehend a suspect for the purpose of turning him over to the judiciary. He is put on trial before a jury to determine whether he is guilty or innocent. He is brought before the court for sentencing -- a process that entails consideration not just of the need for punishment, but also the need and opportunity for rehabilitation. Shooting the suspect as a means of apprehension is excessive in light of these goals and the varied and important social interests behind them. It frustrates the determination of guilt or innocence that is the purpose of apprehension. It obliterates both the substance and appearance of due process that is central to the operation of our criminal justice system. And, finally, it prevents the judicial determination of punishment that is the ultimate

goal of the arrest process, frustrating the possible rehabilitative goals of the criminal justice system in favor of a disposition that only promotes its punishment interests -- retribution and deterrence.

But this is only if the officer is successful. Most of the time he is not. Handguns are an unreliable means of effecting an arrest. For example, the record shows that, between 1969 and 1974, Memphis police used their revolvers to attempt to stop fleeing property crime suspects on 116 occasions. But this resulted in only 16 woundings and 17 deaths. R. 1460-69. Although the data is incomplete, a large percentage of the suspects fired upon eluded capture. Id.; J.A. 129. In the words of the Memphis police director: "The chances are ... under the circumstances where deadly force is used.... he [the police officer] will

not hit [the suspect]." J.A. 130.[38]

Under these circumstances, it is hard to understand how the doctrine can be viewed as "a sufficiently productive mechanism to justify the intrusion on fourth Amendment interests which such [shootings] entail." Delaware v. Prouse, 440 U.S. 648, 659 (1979). The odds are that the officer will either fail to accomplish his objective or accomplish too much. That being so, it cannot be said that the use of deadly force "to apprehend" is "carefully tailored to its underlying justification," Florida v. Royer, 77 L.Ed.2d at 238, or that the Tennessee statute is "narrowly drawn to express only the legitimate state interests at stake." Roe v. Wade, 410 U.S.

---

[38] Director Chapman also testified that part of the reason for banning warning shots was the fact that it had the opposite of the desired effect; it tended to spur the fleeing suspect. He concluded that shots that miss probably have the same effect. J.A. 132-33.

at 155.

(2) The crime prevention interests: The prevention of crime interest has several facets. It does not include the prevention of the crime in which the suspect is engaged. Tennessee authorizes the killing of a felony suspect after the crime has been committed, as occurred in this case.

The interest in disabling the suspect from committing another crime in the indefinite future is the explicit basis cited by the mayor and the police director to justify the Memphis policy.[39] But it

---

[39] The mayor testified that: "[Y]ou let him get away, tomorrow he's in another place stealing guns and maybe the next week he's in the 7-11 blowing somebody's brains out. I'm just a strong man on feeling that a felon is a felon and if you commit a burglary you will step up gradually to something else." R. 1832; accord id. at 1833-34. Similarly, the police director testified that: "We feel a dangerous felon is a person who by virtue of his actions and ... his propensity is an individual who, if allowed to escape from whatever crime you encounter him in, is subject to cause danger, is subject to be in a situation which will be dangerous in the future." J.A. 122-23.

suffers from two distinct constitutional defects: It is both punitive in purpose and excessive.

First, incapacitation is one of the primary goals of criminal sentencing. See J.Q. Wilson, THINKING ABOUT CRIME (1975). Incarceration serves this goal in two ways. It incapacitates the individual from committing further crimes during his sentence and provides specific deterrence, through punishment, against his committing further crimes on release. The use of deadly force to incapacitate in the way suggested by Memphis's mayor and police director is clearly intended to take the place of specific deterrence. Thus, the incapacitation purpose cannot negate the inference of punishment arising from the application of the other Mendoza-Martinez criteria.

Second, the use of deadly force to incapacitate is excessive in its perma-

nency. This is best demonstrated by Coker v. Georgia, 433 U.S. 584 (1977). Despite the exceptional severity of the crime of rape, ("Short of homicide, it is the 'ultimate violation of self.'" Id. at 597), "the death penalty, which is unique in its severity and irrevocability,' [Gregg v. Georgia,] 428 U.S. 187, is an excessive penalty for the rapist who, as such does not take human life." Coker, 433 U.S. at 598. If the killing of a rapist is excessive to incapacitate him and prevent him from repeating that crime, then shooting an unarmed burglary suspect who might, it is speculated, steal another $10 in the future is similarly excessive.

The shooting of fleeing felony suspects may prevent crime in another way: It may serve to deter others. As developed above, the Memphis policy has been justified on just this basis. But this

justification is constitutionally defective for the same two reasons. General deterrence is a core purpose of punishment, Mendoza-Martinez, 372 U.S. at 168, and thus unavailable as an alternative nonpunitive rationale for the fleeing felon doctrine. Moreover, if, despite any deterrent value, death is excessive for crimes as serious as rape or felony-murder, Coker, supra; Enmund v. Florida, 458 U.S. 782 (1982), then it is surely excessive as a deterrent to either burglary or flight.

(3) The safety interests: The state and the city argue that the protection of the public justifies the fleeing felon doctrine. When the suspect is armed or has committed a violent crime, this is so as recognized by the court of appeals. But young Garner had no weapon, threatened no one either during the commission of the crime or afterward, and was not thought by

the police officer to be armed. Authorizing police to shoot under these circumstances does not in any way advance the state's interest in protecting the physical safety of its citizens[40] or, indeed, its police officers.[41]

The state and the city seek to end run the facts by reference to "[t]he need to reduce violence in our society," State's Brief at 11, "the ready availability of handguns in our society and widespread violence," id. at 17, "the long tradition of violence which surrounds the American criminal," City's Brief at 14,

---

40 Manifestly, in a case where the safety interests are properly presented, they would justify resort to deadly force and its use would be non-punitive in nature. This belies the state's strawman argument that "if the killing of a non-violent fleeing felony suspect deprives the suspect of constitutional guarantees, it does so no less with the fleeing violent offender." State's Brief at 18.

41 The record evidence shows that the limitation of the use of deadly force to self-defense and defense of others implemented by the New York City police in 1972 actually increased officer safety, resulting in fewer officer deaths and fewer assaults on officers. J.A. 84, 92, 96.

the common law conception of burglary as an inherently violent crime, id. at 23-25, and the "common experience" that "burglary frequently is associated with crimes of violence against the person." Id. at 25. This rhetoric does not withstand scrutiny.

That handguns are available to criminals and that there is substantial violence in our society cannot justify a rule that allows a police officer to shoot a fifteen-year-old when he is "reasonably sure that the individual was not armed...." J.A. 41. That some criminals are violent cannot create a presumption that all are and, therefore, that all may be shot. "This argument almost always permits the officer to shoot to kill." Garner, 710 F.2d at 244; A. 52. It would be hard to imagine a greater imbalance between the asserted justification and the state's power to kill than a rule premised on the notion that, because killing is

sometimes justified, it is always justified.

The city's argument that burglary is so frequently a crime of violence that it justifies use of deadly force to prevent escape would have appeal if it had any basis in fact. But it does not.[42]

[42] At best, the city's argument is that at the time of the common law and, perhaps, in 1858 when the current Tennessee statute was enacted, burglary was often violent and therefore the common law fleeing felon doctrine is justified as applied to burglars. But, as with the other common law bases for the doctrine, see subsection A(1), supra, circumstances have changed. Indeed, this is reflected in the Model Penal Code comment curiously elicited by the city. While "the offense was originally confined to violent nighttime assault on a dwelling...," the fact that the home "is the place of security for his family, as well as his most cherished possessions" makes it "understandable that ... public fear of the burglar has broadened beyond its original objective." ALI, Model Penal Code, Vol. II, Art. 221-1, Comment at 67. A carefull reading of most of the authorities cited in the city's brief reveals not that they consider burglary a violent crime, but that it is a serious crime because it involves an invasion of the sanctity of the home. The city's reliance on the MPC Comment's reference to the terror instilled by the fear of the burglary is similarly misplaced. The comment did not conclude that burglars terrorize their victims, only that the circumstances of a nighttime burglary do. Id.

The available data refutes the city's "common experience" assertion that burglary is frequently associated with violence. See Lewis v. State, 398 So.2d 432, 438 (Fla. 1981) (aggravating circumstance of prior conviction of "felony involving the use or threat of violence" not satisfied by two prior burglary convictions). The studies show that the singular aspect of burglary is that most burglars go to great lengths to avoid a confrontation and that the vast majority are not armed.[43] The most extensive study

[43] Two studies reported a consistent desire amongst burglars to avoid confrontation; Reppetto found that 70% of all burglars reported that they want to ascertain before entry whether a residence is occupied. T. Reppetto, RESIDENTIAL CRIME 17,105 (1974); N. Shovell, BURGLARY AS AN OCCUPATION (1971). Reppetto found that 75% of all burglars were not armed, 8% were armed with guns, 7% with knives, and 5% with mace. Id. at 107. Another study found that the burglar was armed in only 12% of the few burglaries that resulted in a confrontation with a resident. I. Waller & N. Okihiro, BURGLARY: THE VICTIM AND THE PUBLIC 32 (1978). Tennessee law recognizes this phenomenon, prescribing different penalties for burglary with or without a gun. Tenn. Code Ann. § 39-3-401 (1975).

found that 92% of all burglaries occurred in unoccupied buildings, that more than half of the remaining 8% occurred while the residents were asleep, and that 14% of the remainder occurred without the occupants' awareness of the intrusion. T. Reppetto, RESIDENTIAL CRIME 17 (1974). Only 2.8% of the burglaries studied resulted in a confrontation. This latter figure has been corroborated in another contemporaneous study. Conklin and Bittner, Burglary in a Suburb, 11 Criminology 208, 214 (1973). Even the study that found a higher confrontation rate, I. Waller & N. Okihiro, BURGLARY: THE VICTIM AND THE PUBLIC (1978),[44] reported that only 2.6% of all confrontations involved a physical assault or the threat of one: most involved only brief verbal exchanges.

[44] Although Waller and Okihiro found a confrontation rate of 21%, their sample was extremely small, consisting of only 116 residential crimes. In contrast, Reppetto's sample was 1910.

Id. at 31-32. Only 1% of all burglaries became robberies, only .6% of all murders occurred during burglaries, and only 6.5% of all reported rapes occurred in a residence between strangers. Reppetto, supra, at 3, 93.

Thus, the asserted safety justifications for the fleeing felon doctrine are but a chimera of the common law age.[45] They cannot justify a modern practice that allows police to shoot and kill unarmed, nonviolent, property crime suspects like Edward Eugene Garner.

(4) Effective law enforcement: Finally, the state and city urge that the

[45] The Court has not hesitated to question common law premises when they are no longer supported by the modern experience with crime. In Enmund v. Florida, the Court rejected the application of the felony-murder doctrine as a basis for the imposition of the death penalty. In doing so, it rejected the common sense notion that robbery is so frequently associated with murder that a state legislature could rationally make robbery/felony-murder a capital offense. It looked instead to recent crime statistics that refuted this anecdotal sense of criminal behavior. 458 U.S. at 799-800 & nn. 23-24.

doctrine be maintained because it is necessary to effective law enforcement. "Only through the privilege to use deadly force as a last resort ... is the power to arrest truly effective." State's Brief at 19; see also City's Brief at 15. This argument fails for two reasons.

First, it assumes that allowing escape and imposing death are the only two options available. But if the city complains about "[n]ot giving police officers the necessary power to effectuate the arrest...." City's Brief at 15, it is because the city has failed to develop other alternatives. While it may have been true at the time of the common law that only lethal weapons were available, it is not so in 1984. Other tactical and technological alternatives now exist to effect capture that do not carry the same risk of fatal consequences. See discussion, supra, subsection D(1).

Second, and more importantly, the argument only serves to illuminate the arbitrary nature of the doctrine. If it is the effective power of arrest and the authority of law that we are vindicating, then why cannot deadly force be used to stop the fleeing misdemeanant? Memphis prohibits the shooting of embezzlers no matter how much they have taken or how many people they have victimized. J.A. 142, 190. Yet Garner, who stole $10, was shot. But, as a fifteen-year-old, the most serious crime that he could have been convicted of under Tennessee law in 1974 was delinquency. Tenn. Code Ann. §37-102 (1977). These results cannot reasonably be justified in the name of vindicating lawful authority. That rationale either fails to provide a sensible basis for drawing a line in this area or exposes the fact that the lines drawn by both the

officers in a manner that is equally or more restrictive. See Matulia, A Balance of Forces: A Report of the International Association of Chiefs of Police 17 (National Institute of Justice 1982).[46] The common sense of law enforcement professionals across the nation is that these restrictive standards are workable and do not hamper effective law enforcement.

The judgments and actual practices of the various states are surely relevant to the constitutional "reasonableness" of the fleeing felon doctrine. The city concedes that "[t]here certainly is no consensus among the state legislatures...." Id. at 19. This is much like the situation in

---

46 Moreover, prior fourth amendment cases require similar judgments by police under no less difficult circumstances. See Terry v. Ohio, 392 U.S. at 20,27; Sibron v. New York, 392 U.S. 40, 64 (1968). And, we expect the criminal justice system, including its lay jurors, to make similar judgments regarding future dangerousness all the time. See Schall v. Martin, ___ U.S. ___, 81 L. Ed.2d 201,207,226 (1984); Barefoot v. Estelle, ___ U.S. ___, 77 L.Ed.2d 1090, 1106 (1983).

Tennessee statute and the Memphis policy are wholly arbitrary.

The line drawn by the court of appeals, on the other hand, truly relates "the police response ... to the gravity and need." Givens, 403 U.S. at 419 (Burger, C.J., dissenting). If the officer has cause to believe that a fleeing felon is dangerous, he may be authorized to use deadly force to prevent escape and thus to protect the public.

The state and the city argue that the officer will be unable to make the on-the-spot determinations called for by this rule. State's Brief at 11, City's Brief at 21 (quoting Wiley, 548 F.2d at 1253). But the actual practices of most law enforcement agencies demonstrate its practicability. Fourteen states have adopted the same rule, City's Brief at 30-31, and most police departments already restrain the use of deadly force by police

Payton v. New York, 445 U.S. 573 (1980), where the Court considered and rejected another ancient common law practice. In Payton, the court looked at "custom and contemporary norms" as part of "the constitutional analysis" of what is "reasonable." Id. at 600 ("Only 24 of the 50 states sanction [the practice] and there is an obvious declining trend.") Here only 23[47] states retain the outdated fleeing felon rule; 26 have expressly limited it. As in Payton, "the strength of the trend is greater than the numbers alone indicate." Id. The actual practices of most police departments are governed not by state law but by more restrictive municipal or departmental policies. See Matulia, supra, at 153-54. Ninety-three

47 The city lists Maryland as a common law state, City's Brief at 27, but a reading of Giant Food, Inc. v. Scherry, 51 Md. App. 586, 444 A.2d 483 (1982), shows that the courts of that state are limiting the doctrine to forcible felonies where there is imminent danger.

percent of these policies reject the common law rule, id. at 161; about 75% of them would bar the shooting in this case. Brief in Opposition for Respondent-Appellee at 18.[48]

The outmoded common law rule no longer commands the support of experience or reason in light of modern developments and practices. It cannot withstand scrutiny under the fourth or fourteenth amendments. The constitutional standard for the use of deadly force adopted by the court of appeals should be affirmed

48 This trend holds true even in common law states. For example, Michigan is a common law jurisdiction. See Werner v. Hartfelder, 113 Mich. App. 747, 318 N.W.2d 825 (1982). But more than half of the local law enforcement agencies have deadly force policies that are more restrictive than the common law and about 75% of those are consonant with the standard adopted by the court of appeals. Staff Report to the Michigan Civil Rights Commission at 54 et seq. (May 18, 1981). This trend is particularly true of major metropolitan areas. Although Arizona, Connecticut, Massachusetts, New Mexico, and Ohio are common law states, Phoenix, New Haven, Boston, Albuquerque, Santa Fe, Cincinnatti, and Dayton all have deadly force policies that would bar the shooting in this case. R. 1318, 1291, 1130-1131, 1110, 1330, 1209, & 1218.

because it correctly balances the interests at stake.

The constitutional line drawn by the court of appeals should be affirmed for one further reason. It is a commonplace of constitutional law, not just an aspect of the Terry balance, that the greater the governmental intrusion on life or liberty, the higher the necessary justification. See, e.g., Addington v.Texas, 441 U.S.418,423 (1979); In re Winship, 397 U.S. 358,362 (1970). In authorizing the use of deadly force upon probable cause to make a felony arrest, the fleeing felon doctrine equates the level of certainty required for the power to kill with that necessary for the authority to arrest. Probable cause leaves a large margin for error; it is not proof beyond a reasonable doubt or, even, a preponderance of the evidence. See, e.g., Brinegar v. United States, 338 U.S. 160, 175-76 (1949). It

suffices for an arrest because the nature of the intrusion is limited; it only authorizes the police to hold the suspect for a limited time and then put him before a magistrate. Gerstein v. Pugh, 420 U.S. 103, 113-14 (1975); Baker v. McCollan, 443 U.S. 137, 142-43 (1979).

The fleeing felon doctrine allows the killing of the suspect upon the same probable cause required, and with the same risk of error tolerable, for an arrest. But surely the permanent deprivation of life at the hands of a lone police officer requires a level of certainty slightly more rigorous than that which suffices for a trip to the station house. Otherwise, fatal errors are sure to occur. Garner, after all, was shot on probable cause to believe he was a felon when, under Tennessee law, his greatest crime was delinquency. Similarly, in Pruitt v. City of Montgomery, Civ. Act. No. 83-T-903-N

(W.D. Ala. June 12, 1984), a burglary in progress call ended with the shooting of a teenager who had been necking with his girlfriend. No crime had occurred at all.

A system of law "mindful that the function of legal process is to minimize the risk of erroneous decisions," Addington, 441 U.S. at 425, can accept this level of error when the only consequence is a short term deprivation of liberty. The rule adopted by the court of appeals only calls for a little more certainty regarding the necessity of police action that may well have fatal consequences. It should be affirmed.

II. THE JUDGMENT BELOW SHOULD BE AFFIRMED BECAUSE THE MEMPHIS POLICY AND CUSTOM IS ONE OF LIBERAL USE OF DEADLY FORCE THAT RESULTS IN THE EXCESSIVE AND UNNECESSARY USE OF SUCH FORCE TO STOP NONDANGEROUS, FLEEING FELONY SUSPECTS

Although the court of appeals did not reach the question of the constitutionality of Memphis's policies and customs regarding the use of deadly force, it was familiar with Memphis's exceptional record of shooting fleeing suspects, particularly blacks. See Hayes v. Memphis Police Dep't., 571 F.2d 357 (6th Cir. 1978); Wiley v. Memphis Police Dept., 548 F.2d 1247 (6th Cir. 1977); Qualls v. Parish, 534 F.2d 690 (6th Cir. 1976); Beech v. Melancon, 465 F.2d 425 (6th Cir. 1972); see also Cunningham v. Ellington, 323 F. Supp. 1072 (W.D. Tenn. 1971) (three judge court); McKenna v. City of Memphis, 544 F. Supp. 415 (W.D. Tenn. 1982) (shooting of brother officer in attempt to stop fleeing misdemeanant).[49] The excessiveness of the

[49] It is noteworthy that Memphis accounts for about 30% of all the reported federal cases on this issue in the last 10 years. This is not surprising. The percentage of firearm discharges against non-dangerous, fleeing suspects as compared to all firearm discharges by Memphis police is 50.7%, J.A. 100; R. 1469, one of the highest in the country. See J.A. 100 (11.3% in New York between 1971-1975); W.E. Geller & K.J. Karales, Split Second Decisions: Shootings of and by Chicago Police 6 (Chicago Law Enforcement Study Group 1981) (17% between 1974-

Memphis policies and customs in violation of the fourth amendment and the due process clause, which accounts for this record, also provides an alternative ground for affirming the judgment below. Smith v. Phillips, 455 U.S. 209, 215 n.6 (1982); United States v. New York Telephone Co., 434 U.S. 159, 166 n.8 (1977).

Even assuming the appropriateness of using one's revolver to arrest a suspect, Memphis's policies, practices, and customs are excessive. Memphis arms its officers with "dum-dum" bullets and trains them to shoot at the target's torso. The indelible impression upon the Memphis police

---

1978); M. Myer, Police Shootings at Minorities: The Case of Los Angeles, 32 Annals of Amer. Acad. of Pol. & Soc. Sci. 98, 104 (1980) (between 1974-1978, 15% of all shootings at blacks, 9% of all shootings at Hispanics, and 9% of all shootings at whites); M. Blumberg, The Use of Deadly Firearms by Police Officers: the Impact of Individuals, Communities, and Race 207 (Ph.D. Dissertation, S.U.N.Y., Albany, Sch. of Crim. Justice Dec. 14, 1982) (7.8% in Atlanta between 1975-1978; between 1973-1974, 4.6% in the District of Columbia, 10% in Portland, Ore., but 58.1% in Indianapolis).

officer is that the policy of the department is to shoot to kill. Moreover, departmental policies and customs -- including inadequate training in alternatives to deadly force and inadequate stress on the necessity of exhausting other reasonable alternatives -- also encourage the quick resort to the use of deadly force without a proper effort to exhaust alternatives.

Most important, however, are the departmental policies that insulate officers from any discipline for use of excessive force. In addition to the evidence in this record, the Court should consider that before it in Brandon v. Holt, No. 83-1622. There the evidence established, and the district court found: that departmental policies insulated the police director from any knowledge of misconduct by his subordinates; that there was a tacitly sanctioned code of silence

that prohibited officers and supervisors alike from relating incidents of misconduct; that there was a provision in the contract with the union that prohibited reassignment to a desk job for disciplinary reasons; and that the Civil Service Commission's consistent failure to uphold dismissals for police misconduct resulted in a departmental decision not to attempt any disciplinary action. In short, the disciplinary situation was characterized by Director Chapman as "hopeless." Brief for Petitioners in No. 83-1622 at 12-17.

The proximate result of these policies is use of deadly force in situations where it is unnecessary and excessive as a means of apprehension. This case provides an adequate illustration: The police experts testified that Ryan should have attempted to apprehend young Garner, who was only 30 to 40 feet away, rather than relying solely on his

gun. A. 8. Other illustrations abound. In McKenna, the officer who shot his fellow officer was firing at a fleeing misdemeanant; he was a known shooter but had never been disciplined or retrained. 544 F. Supp. at 417. In another instance, Memphis officers shot and killed a fleeing black teenager who had stolen a car, even though his accomplice was already in custody and could have provided identification. The officer who shot never considered any alternatives, not even giving chase down an empty downtown street. R. 844-45.

"In this case, City officials did set the policies involved ... training and supervising the police force...." Leite v. City of Providence, 463 F. Supp. 585, 589 (D. R.I. 1978), exposing the city to liability under Monell. Young Garner was shot pursuant to a policy "which allows an officer to kill a fleeing felon rather

than run the risk of allowing him to escape apprehension." Garner, 400 F. 2d at 54; A. 16. Hymon did no more than follow that policy, as he "was taught." Id. at 53; A. 16. The judgment below should be affirmed on this basis.

III. MEMPHIS'S POLICY AUTHORIZING THE DISCRETIONARY SHOOTING OF NONDANGEROUS, FLEEING PROPERTY CRIME SUSPECTS VIOLATES THE FOURTH AMENDMENT AND THE EQUAL PROTECTION CLAUSE BECAUSE IT INVITES AND RESULTS IN RACIAL DISCRIMINATION

The Memphis policy runs afoul of the Constitution in another fundamental way not discussed by the court of appeals: the breadth of the discretion that it confers upon individual officers is susceptible to racially motivated abuse; the materials in the offer of proof depict the policy "in actual operation, and the facts shown establish an administration ... with an evil eye and an unequal hand" against blacks. Yick Wo v. Hopkins, 118

U.S. 356, 373-74 (1886); see also Furman v. Georgia, 408 U.S. 238, 389 n.12 (1972) (Burger, C. J., dissenting).

In Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977), the Court discussed what is necessary to prove that a particular policy or law is discriminatory.

> [Washington v.] Davis does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one....
>
> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action -- whether it "bears more heavily on one race than another," Washington v. Davis, supra, at 242, 48 L. Ed. 2d 597, 96 S.Ct. 2040 -- may provide an important starting point. Sometimes a clear pattern unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. Yick Wo v. Hopkins, 118 U.S.

> 356, 30 L.Ed. 220, 6 S.Ct. 1064 (1886).....
>
> The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes.....

Id. at 267-67.

Here, the Memphis policy authorizing use of deadly force against non-dangerous fleeing property crime suspects clearly "bears more heavily on one race than another" and is "unexplainable on grounds other than race." Id. Blacks accounted for 84.21% of the property crime suspects shot by Memphis police between 1969 and 1974, although blacks comprise only 70.5% of those arrested for property crimes. In contrast, the number of black violent crime suspects who were shot at was proportional to the racial breakdown of violent crime arrests. R. 1589-92, 1559-62, 1769-77. Controlling for differential involvement in property crimes,

blacks were more than twice as likely to be shot at, four times more likely to be wounded, and 40% more likely to be killed. J.A. 101-02.[50] The great disparity in blacks shot by Memphis police officers is largely accounted for by the policy allowing the shooting of non-dangerous fleeing felons. Between 1969 and 1976, Memphis police killed 2.6 unarmed, non-assaultive blacks for each armed, assaultive white. J.A. 103-04.

The racially discriminatory nature of this pattern is confirmed by its roots in a policy giving officers unlimited discretion to use their own judgment in determining when to shoot non-dangerous fleeing property crime suspects. See,

---

[50] Evidence produced at the Wiley trial confirms this data. Although the Wiley statistical data covered a shorter period, 1969-1971, it indicated that blacks were shot at disproportionately in relation to the racial breakdown of property crime arrests, and that this disproportion was significant at the .02 level (less than two chances in 100 that the difference was due to chance). R. 1559-62, 1769-77.

e.g., R. 195-96.[51] This consignment to the officer's discretion is "a ready mechanism for discrimination," Rowe v. General Motors Corp., 457 F. 2d 348, 359 (5th Cir. 1972) (Title VII), "support[ing] the presumption of discrimination raised by the statistical showing." Castaneda v. Partida, 430 U.S. 482, 494 (1977) (citing Washington v. Davis, 426 U.S. at 241).

This conclusion is particularly strong in this case. As detailed above, the Memphis Police Department has a history of discrimination that was

---

[51] The mayor testified: "I'm not sure that every officer would react, for example, to a fleeing burglar ... the same as another.... That doesn't mean, in my opinion, that every policeman will shoot an escaping person, felon, if they can't apprehend him. There may be some people over there, I don't know who they are or anything else, but I believe some would say 'I'm just not going to shoot that fellow. I believe we can catch him. I believe he is catchable.'" J.A. 115.

Similarly, Director Chapman testified that: "We rest our case in the judgment of [the] police officer.... I think that you would find more cases of escaping burglars who in effect successfully escaped and who did not have deadly force used against them." J.A. 128-29.

unabated at the time of the Garner shooting. Thus, the consequences of the unlimited discretion to shoot are predictable: When shootings by Memphis officers are most likely to be in response to bona fide safety concerns, i.e., against violent crime suspects, there is no disparate racial result. But when shootings are not motivated by need and are optional, see n.51, supra, blacks are shot at disproportionately.[52]

The fourth amendment's and equal protection clause's concerns coincide in this case. The fourth amendment was adopted to control the danger of abuse

---

[52] At minimum, the proffer establishes a prima facie case, shifting the burden to the city to rebut. Castaneda, 430 U.S. at 493-96. The district court's distortions, suppositions, and attack on the "bias" of respondent's expert cannot suffice to fill this "evidentiary gap." Id. at 499. Nor does the fact that Hymon was black "dispel the presumption of purposeful discrimination." Id. In 1974, Hymon was only one of a small minority of black officers in a department where racism was well entrenched; in the police director's words, "the black officers tried to out red-neck the white officers...." J.A. 137. See Castaneda, 430 U.S. at 499.

inherent in broad, discretionary police powers.

> A central concern ... has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasion solely at the unfettered discretion of officers in the field.

Brown v. Texas, 443 U.S. 47, 51 (1979). The amendment was a reaction to the English and colonial experience with general warrants and writs of assistance, which conferred too much discretion on the executing officer: "a discretionary power ... to search wherever their suspicions may chance to fall," Wilkes v. Wood, 19 Howell St. Tr. 1153, 1167 (1763); "a power that places the liberty of every man in the hands of every petty officer." 2 L. Wroth & H. Zobel (eds.), LEGAL PAPERS OF JOHN ADAMS 141-42 (1965) (reporting Otis's argument against the writs of assistance).

Although the warrant requirement is the fourth amendment's primary device for

limiting police discretion, the Court has recognized and implemented this principle in a variety of other contexts. See, e.g., Donovan v. Dewey, 452 U.S. 594, 599, 601, 605 (1981); Delaware v. Prouse, 440 U.S. at 654-55, 661, 662; Brown v. Texas, 443 U.S. at 51; Beck v. Ohio, 379 U.S. 89, 97 (1964). Yet, both the Memphis policy and the Tennessee common law fleeing felon rule place life itself within the unguided discretion of each and every police officer.

> [T]o insist upon neither an appropriate factual basis ... nor upon some other substantial and objective standard or rule to govern the exercise of discretion "would invite intrusions upon constitutionally guaranteed rights...."

Delaware v. Prouse, 440 U.S. at 661 (quoting Terry v. Ohio, 392 U.S. at 22). This has surely been the experience in Memphis, where police exercise their discretion differentially based on the race of the suspect.

Thus, the court of appeals was correct in imposing an objective standard based on danger and need to limit police discretion to shoot fleeing suspects. The totally discretionary nature of the authority to shoot given Memphis police officers, resulting in disproportionate numbers of nonthreatening blacks being shot, is at war with the basic notion of our constitutional system. "For, the very idea that one man may be compelled to hold his life ... at the mere will of another, seems to be intolerable in any country where freedom prevails...." Yick Wo, 118 U.S. at 370.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

J. LeVONNE CHAMBERS
STEVEN L. WINTER *
99 Hudson Street
New York, New York 10013
(212) 219-1900

WALTER L. BAILEY, JR.
Suite 901, Tenske Building
161 Jefferson Avenue
Memphis, Tennessee 38103
(901) 521-1360

Attorney for Appellee-Respondent

* Counsel of Record

AMICUS CURIAE

BRIEF

Nos. 83-1035
83-1070

In the

Supreme Court of the United States

October Term, 1984

The State of Tennessee,

Appellant,

and

Memphis Police Department; City of Memphis, Tennessee,

Petitioners,

v.

Cleamtee Garner, as father and next of kin of Edward Eugene Garner, a deceased minor,

Respondent-Appellee.

BRIEF OF AMICUS CURIAE FOR THE RESPONDENT-APPELLEE

Florida Chapter of the National
Bar Association
on behalf of
The National Bar Association

Deitra Hicks, Esq.
5411 Soutel Drive
Jacksonville, FL 32208
(904) 764-5411
Counsel of Record

BEST AVAILABLE COPY

Questions Presented

I

Whether the racially neutral common law fleeing felon statute which confers unlimited discretion on police officers in determining when a non-dangerous, fleeing felon should be shot is racially discriminatory as applied.

II

Whether a state statute allowing law enforcement officers to shoot fleeing felony, suspects, whom the officers reasonably assume to be unarmed and engaged in non-violent property crimes, violate the suspects' due process of law.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Table of Authorities	iii
Statement of the Case and Facts	1
ARGUMENT I—	
The Racially Neutral Common Law Fleeing Felon Statute Which Confers Unlimited Discretion on Police Officers in Determining When a Non-Dangerous, Fleeing Felon Should Be Shot Is Racially Discriminatory as Applied	2
ARGUMENT II—	
A State Statute Allowing Law Enforcement Officers to Shoot Fleeing Felon Suspects, Whom the Officers Reasonably Assume to Be Unarmed and Engaged in Non-Violent Property Crimes, Violate the Suspects' Due Process of Law	13
CONCLUSION	18

TABLE OF AUTHORITIES

Cases:	PAGE
Arlington Heights v. *Metropolitan Housing Corp.*, 429 U.S. 252 (1977)	9
Atkins v. *Texas*, 325 U.S. 398 (1945)	11
Bivens v. *Six Unknown Agents*, 403 U.S. 388 (1971)	16
Castaneda v. *Partida*, 430 U.S. 482 (1977)	6, 11, 11n, 12n
Cupp v. *Murphy*, 412 U.S. 291 (1973)	14
Furman v. *Georgia*, 408 U.S. 236 (1972)	9n
Garner v. *Memphis Police Dept.*, 710 F.2d 240 (6th Cir. 1983)	13n, 14
Gregg v. *Georgia*, 428 U.S. 153 (1976)	14
Hernandez v. *Texas*, 347 U.S. 478 (1954)	11
Jenkins v. *Averett*, 424 F.2d 1228 (4th Cir. 1970)	13
Malinsky v. *New York*, 324 U.S. 401 (1945)	16
Rochin v. *People of California*, 342 U.S. 165 (1951)	15, 17
Simmons v. *City of Chicago*, 118 Ill. App.3d 676, 455 N.E.2d 232 (1983)	5
Terry v. *Ohio*, 392 U.S. 1 (1968)	13, 14
Turner v. *Fouche*, 396 U.S. 346 (1970)	12n
U.S. v. *Watson*, 423 U.S. 408 (1976)	14
Washington v. *Davis*, 426 U.S. 224 (1976)	10n
Whitus v. *Georgia*, 385 U.S. 545 (1967)	12n
Wiley v. *Memphis Police Dept.*, 548 F.2d 1247 (6th Cir. 1977)	2, 2n, 3, 14, 15
Yick Wo v. *Hopkins*, 118 U.S. 356 (1886)	8

PAGE

Constitutional and Statutory Authorities:

U.S. Constitution amend. IV 13

U.S. Constitution amend. XIV, §1 ..... 2, 8

Fl. Stat. Ann. §776.05 (1983) 6n

Ill. Rev. Stat. Ch. 38, §7-5(a) (1977) 5

Mo. Rev. Stat. §559.040 (Vernon 1969) 6n

Mo. Rev. Stat. §563.046 (3)(2)(a) (Vernon 1979) 6n

N.Y. Penal Law §35.30(1)(a) (McKinney Supp. 1975) 5n

Tenn. Code Ann. §40-7-108 ..... 8, 14

Wis. Stat. §939.45(4) (1973) 6n

Other Authorities:

A. Bent, *The Politics of Law Enforcement* (1974) 9n

Fyfe, *Blind Justice: Police Shootings In Memphis*, 73 Crim. L. & Criminology 707 (1982) 12n

Harper, *Accountability of Law Enforcement Officers in the Use of Deadly Force*, 7 Black L.J. 347 (1981)....7n, 11n

D. Perry and P. Sornoff, *Politics at the Street-Level: The Select Case of Police Administration and the Community* (1972) 10n

W. LaFave & A. Scott, *Handbook on Criminal Law* (1972) 15n

Comment, *Deadly Force to Arrest: Triggering Constitutional Review*, 11 Harv. Civ. Rights—Civ. Lib. L. Rev. 360 (1976) 15n

National Center for Health Statistics (NCHS), Division of Vital Statistics (U.S. Public Health Service) (1978) 8n

PAGE

Note, *Tennessee Code Section 40-7-108 authorizing the use of deadly force against an unarmed suspect of a nonviolent felony is unconstitutional under the Fourth and Fourteenth amendments—Garner* v. *Mempshis Police Department*, 710 F.2d 240, 52 U. Cin. L. Rev. 1155 (1983) 13n

Note, *The Unconstitutional Use of Deadly Force Against Non Violent Fleeing Felons: Garner* v. *Memphis Police Department*, 18 Georgia L. Rev. 137 (1983) 13n

Substantive Due Process and the Use of Deadly Force Against the Fleeing Felon: Wiley v. *Memphis Police Department & Mattis* v. *Schnarr*, 7 Cap. U.L. Rev. 497 (1978) 7n

Nos. 83-1035
83-1070

IN THE

Supreme Court of the United States

October Term, 1984

THE STATE OF TENNESSEE,

Appellant,

and

MEMPHIS POLICE DEPARTMENT; CITY OF MEMPHIS, TENNESSEE,

Petitioners,

v.

CLEAMTEE GARNER, as father and next of kin of Edward Eugene Garner, a deceased minor,

Respondent-Appellee.

BRIEF OF AMICUS CURIAE FOR THE RESPONDENT-APPELLEE

Statement of the Case and Facts

This is a civil action before the United States Supreme Court after certiorari to review the decision of the Sixth Circuit Court of Appeals was granted to the State of Tennessee, Appellant, and the Memphis Police Department and the City of Memphis, Tennessee.

A summary of the facts are that on October 3rd, 1974, two police officers responded to a report that a black male, Edward Garner, was seen entering into a house in suburban Memphis. After questioning the neighbor who called in the report, they went to the house in question. The two

officers split up and went around the sides of the house. Upon reaching the back of the house, Officer Hyman observed someone run from the house. He shined a flashlight on the suspect and concluded the latter was unarmed.

Identifying himself as a police officer, the officer commanded Garner to halt. When Garner failed to halt, but instead attempted to climb a fence, the police fatally shot Garner in the head. The decedent was only fifteen years old.

ARGUMENT I

The Racially Neutral Common Law Fleeing Felon Statute Which Confers Unlimited Discretion on Police Officers in Determining When a Non-Dangerous, Fleeing Felon Should Be Shot Is Racially Discriminatory as Applied.

One of the grounds upon which appellee-respondent maintains the Court should affirm the decision of the Sixth Circuit Court of Appeals is that the Memphis Police Department policy authorizing the discretionary shooting of non-dangerous fleeing property crime suspects violates the Equal Protection Clause of the Fourteenth Amendment because it discriminates against people because of their race.

Statistics recorded for the City of Memphis substantially show that a disproportionate number of blacks and other minorities will be victims at the hands of police officers under the common "fleeing felon" or "deadly force" statute than whites. The record is rep' te with statistics that when appropriately analyzed dictates the abolition of the common law deadly force statute in Tennessee. App. 1460-1469.[1]

[1] Citations to the record in *Wiley* v. *Memphis Police Department*, 548 F.2d 1247 (6th Cir. 1977) are to the Joint Appendix in the Sixth Circuit and are designated as App. —.

From October 10th, 1966, to October 3rd, 1974, the Memphis Police Department recorded approximately 225 instances of firearm discharges to attempt to stop fleeing felony suspects. Approximately 31 instances of police firearm discharges resulted in death. *Id.* Non-violent property crime suspects accounted for 114 of those shot at by the police. Of the 114 shot, 96 were black (21 juveniles, 37 adults, and 37 of unknown age) and 16 were white (one juvenile, ten adults and five unknown). Two were of unknown race or age. Of the 17 victims suspected of burglary, while only four were white, 13 were black (five juveniles and eight adults). *Id.* Amazingly, only 24 victims were killed in the commission of violent crimes or because the police were acting in self defense or in the defense of others.

A detailed analysis of use of deadly force by the Memphis Police Department is found in Appellee's Brief at 27-29. Analysis of the data reveals that although black citizens were found to account for 70.6 percent of the arrest population for property crime offenses, they accounted for 88.4 percent of the shooting victims in property crimes. *Id.* at 27. Thus, in a city where the white population was greater than that of the black, the death rate for black property crime suspects was substantially higher at .63 per 1000 black property crime arrests, than white citizens at .45 per 1000 white property crime arrests.

The disparities increase tremendously for property crime suspects who are shot at by police. Black citizens have the highest rate of 4.33 per 1000 black property crime arrests compared with a white rate of 1.81 per 1000.

Finally, the statistics reveal that blacks are four times more likely to be wounded by police than whites, .386 per 1000 blacks and .113 per 1000 whites.[2] These figures un-

[2] Appellee's Brief at 28. The preceding analysis was provided by Dr. James Fyfe who reviewed the data and accounted for the differential racial representation in the arrest population. Dr. Fyfe is a professor at American University, Washington, D.C., and a leading authority on the police use of deadly force.

doubtedly show that the use of deadly force by the City of Memphis police department had a disproportionate impact on black citizens. More devestatingly, a close look at the evidence shows that black juveniles are the victims of police shootings far more often than white juveniles.

In each separate category of criminal offenses, police officers more readily discharged their firearms at black youths, killing more of them than white adults and white juveniles combined. Just as in *Garner*, the majority of these black youths are killed in situations involving nonviolent property crimes.

Data collected from major cities throughout the United States demonstrate that a significantly higher percentage of blacks are victims of police use of deadly force. For example, from 1950-1960, blacks comprised 22 percent of the total population in Philadelphia, yet they accounted for 87.5 percent of the deaths by police officers. R.1083.[3] Taking into account the differential racial representation in the arrest population, black suspects were approximately twenty-two times more likely to be killed than whites. Analysis of these shooting incidents also revealed that more than half of the victims were under 2[illegible] years old.

Similarly in Chicago, from 1969-1970, although blacks constituted only 33 percent of the population, they accounted for 55.4 percent of the arrest population and 70.9 percent of the fatalities. This is especially significant in light of the fact that the fatality rate of whites is approximately one/sixth that of blacks, and whites only constitute 35.7 percent of the arrest population. R.1084. In a study performed in Chicago during the same period, statistics revealed that Spanish-Americans had the highest death rate for the entire population at 4.5 per 100,000; black

[3] Citations to the record below are to the Joint Appendix in the Sixth Circuit and are designated as R. —. The preceding information was obtained from a study on the police use of deadly force prepared by the Law Enforcement Assistance Administration, U.S. Dept. of Justice in 1979.

deaths accounted for 2.67 per 100,000; and whites, 0.34 per 100,000. R.1085. This study also indicated that blacks accounted for 73.3 percent of the arrest population for felony offenses and 74.7 percent of the fatality victims, a conclusion consistent with the prior Chicago study.

The fatality rate was greatest for suspects under 25 years old. This observation is consistent with the evidence for Philadelphia. Although 85.5 percent of the cases were designated justifiable homicides by the coroner, the researchers accounted for the interdependence of the coroner's office with the police department, state attorney, and internal affairs division, and adjusted this rate downward. An objective review of the evidence indicated 36.8 percent of the investigated incidents exhibited evidence of police misconduct. R.1084. The reasons attributed to this disproportionate percentage of justifiable homicides are the "lack of independent examinations within the system," *id.*, and closed investigative proceedings shielded from the public's view.

All of the Chicago data was collected during a period when the State of Illinois had a common law fleeing felon statute in effect. In a recent decision, *Simmons* v. *City of Chicago*, 118 Ill. App.3d 676, 455 N.E.2d 232, (1983), interpreting Ill. Rev. Stat., ch. 38, §7-5(a) (1977) the court recognized that the common law authority of police officers to use deadly force was curtailed to use only against offenders engaged in a "forcible felony". States proscribing this common law rule have not been challenged on constitutional grounds.

A study conducted in New York[4] for the years 1970 to 1973 show that 73 percent of the individuals killed by po-

[4] New York adopted the Model Penal Code approach to the use of deadly force in 1965, but returned to the forcible felony concept in 1967. Using this approach, New York specifies the crimes which may trigger the use of deadly force. *See* N.Y. Penal Law §35.30 (1)(a) (McKinney Supp. 1975).

lice were minorities: 52 percent black and 21 percent Hispanic, in comparison to 10 percent white. R.1086.

The report also revealed that there are significant disparities based on the race of the policeman/offender, and that this disparity occurs as the result of racial discrimination on the part of indivdual officers. During this period white officers fatally shot 96 black and 4 Hispanic criminal suspects. *Id.* In contrast, the number of white suspects killed by black and Hispanic police officers combined, was only two.[5] Hispanic officers accounted for one percent of the police force, yet killed two percent of the black victims, and six percent of all Hispanic victims. R.1086. Yet, these figures do not preclude a finding of racial discrimination against minorities.[5a]

In the aggregate sample of 320 shootings from seven large cities in the United States,[6] it was determined that 30 percent were fatal shootings and 79 percent of the shooting victims were black. R.1093.

At the time of this study three other cities that codified the common law statute permitting the use of deadly force to arrest a felony suspect were Kansas City, Miami and Milwaukee.[7] Based on the data provided for Kansas City, black citizens were 7.5 times more likely to be victims of

[5] R. 1086. Although black police officers constituted six percent of the New York Police Department between 1970 and 1973, they were far more likely to shoot blacks and Hispanics (9 and 18 percent, respectively).

[5a] *See Castaneda* v. *Partida*, 430 U.S. 482, 499 (1977) (As a matter of law one should not assume that members of one recognizable and distinct group will not "discriminate against other members of their group.")

[6] The seven cities included: Birmingham, Alabama; Detroit, Michigan; Indianapolis; Indiana; Kansas City, Missouri; Oakland, California; Portland, Oregon; and Washington, D.C.

[7] Mo. Rev. Stat. §559.040 (Vernon 1969) recodified Mo. Rev. Stat. §563.046 (3)(2)(a) (Vernon 1979); Fla. Stat. Ann. §776.05 (1983); Wis. Stat. §939.45(4) (1973).

police use of deadly force, than their white counterparts. Similarly, in Miami the ratio of blacks killed in comparison with whites was 8.8 to one. However, Milwaukee exhibited the most disproportionate rate of all three cities. Blacks were victimized by police use of deadly force at a rate 29.5 times more than their white counterparts.[8] Although the authors concluded Kansas City and Miami exhibited high rates of justifiable homicides, 4.50 per 1,000,000 and 7.06 per 1,000,000, respectively, these figures are questionable.[9] The discretion permitted police officers in the use of deadly force to effect arrests under common law statutes are subject to different interpretations statewide throughout various law enforcement departments. This lack of specific guidelines for the use of deadly weapons under this common law statute means that the killing of a non-violent property crime suspect may be considered justifiable in one part of the state and not another.[10] Thus, it is inevitable that these disparities in perception are bound to exist among officers within the same department.[11]

One study reveals that approximately 89 percent of all police nationwide who killed civilians were white, 7 percent of the police were black and 4 percent were Spanish American. R.1080.

[8] R. 1097 (table 6).

[9] R. 1099 (table 9).

[10] Substantive Due Process and the Use of Deadly Force Against the Fleeing Felon: *Wiley* v. *Memphis Police Dept.* & *Mattis* v. *Schnarr*, 7 Cap. U. L. Rev. 497, 498 (1978) recognizes that state courts vary in determining when deadly force may be used to effect an arrest.

[11] R. 1095. Differences in perception are the result of diverse personal philosophies, and degree of restrictions or leniency of the police department. *See also* Harper, Accountability of Law Enforcement Officers in the Use of Deadly Force, 7 Black L.J. 347, 355 (1981). Because there is no required performance level, individual police officers determine what is reasonable and just in a particular instance.

Nationwide data also show that a larger number of blacks become civilian fatalities at the hands of police than whites. Non-whites constituted between 47 and 50 percent of the fatally injured.[12] Although blacks constituted approximately 10-11 percent of the total American population in 1964 and 1968, one study shows blacks constituted 28 percent of total arrests and 51 percent of total civilian deaths.[13] Thus, the disproportionate number of blacks fatally wounded by police use of force justifies an assessment of whether there has been a violation of the equal protection clause of the Fourteenth Amendment.

The Court has long recognized that the discriminatory application of a state statute on the basis of race is prohibited under the equal protection clause of the Fourteenth Amendment. *See Yick Wo* v. *Hopkins*, 118 U.S. 356, (1886). A state law neutral on its face, yet reserving arbitrary discretion in the law enforcement officers to determine whether a suspect should live or die, opens the door for unending discrimination against any race or class of people, thus, nullifying the right to equal protection under the law. *See id.* at 362. The common law fleeing felon statutes impose no guidelines or standards on police officers discretion in using deadly force to effect an arrest. *See* Tenn. Code Ann. §40-7-108; Accord, Florida Stat. Ann. §776.05 (1983):

> A law enforcement officer, or any person whom he has summoned or directed to assist him, need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of force which he reasonably

[12] R. 1076-1077 citing National Center for Health Statistics (NCHS), Division of Vital Statistics (U.S. Public Health Service) (1978).

[13] R. 1079-1080. The author also notes that in 1964 when blacks accounted for less than thirty percent of arrests for major crimes —homicides, rape, robbery, aggravated assault, burglary, theft and auto theft—"blacks constituted 51 percent of civilian deaths."

> believes to be necessary to defend himself or another from bodily harm while making the arrest or when necessarily committed in retaking felons who have escaped *or when necessarily committed in arresting felons fleeing from justice.* (emphasis added)

These statutes and others which codify the common law allow law enforcement officers to use diverse methods, including deadly force, to effect an arrest.[14] Lack of standards permit a host of factors, including race, to play a part in which suspects are shot and which are arrested by some less destructive alternative. Statistics bear out the fact that left to their own discretion, a significantly disproportionate number of black suspects will be fatally shot by police.

Prevailing case law clearly embraces the proposition that racial discrimination can be inferred from the historical background underlying the decision. *Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U.S. 252, 266-267 (1977). Historical discrimination within the Memphis Police Department is a fact. The number of blacks and minorities employed within the department at the time of Garner's death was less than 6 percent.[15] This number was significantly lower than the racial distribution of the entire population of Memphis: 61 percent white, 39 percent black.[16]

[14] A look at *Furman* v. *Georgia*, 408 U.S. 238, 256-257 (1972) (Douglas, J., concurring) reveals " . . . discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination, and discrimination is an ingredient not compatible with the idea of equal protection of the laws . . . "

[15] A. Bent, The Politics of Law Enforcement 95 (1974). The racial distribution of policemen in the sample is approximately the same found throughout the entire police department (Table 5-4). The author was an assistant professor of political science at Memphis State University and a consultant to the Memphis Police Academy of the Memphis Police Department Training Division at the time of this publication.

[16] Id. at 92.

As late as 1968, "recruitment, selection and promotion in the department was essentially political." [16] Discrimination was recognized by the public, police officials and sociologists. The tension that existed between white officers and black citizens had led to the creation of programs to improve police-community relations. However, in Memphis, police liaisons with the black community rarely relayed these citizens concerns about police brutality and shoddy police service. Even local politicians dared not "give in" to the numerous requests of the black community because it would be detrimental to their political careers.[17]

Sociologists recognized that most major urban cities are torn along racial lines over the administration of the law and the enforcement of order. Policemen are seen as products of a white environment. They experience fear, anger, confusion and frustration when patrolling black communities.[18]

This consistent pattern of racial discrimination on the part of Memphis police officials, politicians, and street-level officers clearly shows a violation of the Equal Protection Clause.[19]

In addition, the highly discretionary policy in effect at the time Garner was killed contributes to the pattern of

---

[16] *Id.* at 113.

[17] *Id.* at 113. For example, Claude Armour, vice-mayor and commissioner of both fire and police, was aware of problems in the black community, but rarely acceded their requests.

[18] *Id.* at 42 (footnote omitted), citing D. Perry and P. Sarnoff, "Politics at the Street-Level: The Select Case of Police Administration and the Community," (a paper prepared for delivery at the annual meeting of the American Political Science Association, Washington, D.C., September 5-9, 1972), P. 37. *See also* R. 1928-1929. As late as 1972 blacks perceived the police as their enemies in the City of Memphis.

[19] Compare Washington v. *Davis*, 426 U.S. 229 (1976). Unlike the Appellees in the case at bar, the officers in *Davis* were unable to show a history of discriminatory actions, or a single administrative action taken for "invidious" purposes.

racial discrimination on the part of police officers. The policies are subject to the individual's perception of the circumstances at the time he apprehends a fleeing felon. Individual interpretations lead to the application of the common law in a non-systematic manner within one single police department.[20] These interpretations are influenced by the values of the department and the society that supports them. Thus, use of deadly force in apprehending fleeing felony suspects will vary considerably among the numerous departments despite the similarities codified in the state statutes.

The common law policy does not preclude invidious discrimination of any racial classification. Thus, because the statute is not applied in the same manner, some officers are apt to discriminate on the basis of race, in violation of the equal protection clause of the Fourteenth Amendment.[21]

As in jury selection cases, where disproportionate impact on a specific racial class is coupled with a system of selection that is discretionary or easily subject to abuse, discriminatory intent may be inferred. *See Castaneda* v. *Partida*, 430 U.S. 482, (1977); *Hernandez* v. *Texas*, 347 U.S. 478 (1945), *Atkins* v. *Texas*, 325 U.S. 398 (1945).

A similar analysis can be employed to show a violation of equal protection has occurred in the context of fleeing

---

[20] Harper, Accountability of Law Enforcement Officers In The Use of Deadly Force, 7 Black L.J. 347 (1981) advocates instituting a "defense of life" policy which would eliminate arbitrary actions and result in greater accountability on the part of the police in their use of deadly force.

[21] *See infra* p. 2-6, text shows that the majority of officers involved in police homicides are white. Despite suggestions in R. 1086 that black officers kill black suspects this does not undermine the denial of equal protection argument. *See Castaneda* v. *Partida*, *supra*, 430 U.S. 482. It is conceivable that a black officer wishing to be promoted may shoot black suspects to curry favor with high level officers or be considered "one of the boys". Thus, it is of very little relevance whether the assailant is a member of a majority or minority group.

felon cases. In Memphis blacks accounted for 70.6 percent of those arrested for property crimes between 1969 and 1976, and 88.4 percent of these suspects were shot by the Memphis police. Appellee's Brief, *supra*, at 27. Of those suspects fatally wounded 50 percent were unarmed and nonassaultive. *Id.* at 28. "Memphis police killed 2.6 unarmed, non-assaultive blacks for each armed, assaultive white" *Id.* (citation omitted). These differences are as great as those deemed significant in the jury selection cases.[22] The discretionary aspect of the common law statutes result in an unreasonable and totally disproportionate number of blacks and minorities being killed by police officers.[23] These results clearly question whether police officers treat all similarly situated non-violent fleeing felons in the same manner. Murdering a significantly disproportional number of blacks bears no rational relationship to a state objective to preserve the peace within a community and apprehend all felony suspects.

In the instant case, appellee provided the United States District Court for the Sixth Circuit with enough evidence to prove the City of Memphis policy on deadly force was motivated by racial animosity. This evidence was erroneously deemed insufficient to set forth a prima facie case to prove the existence of racial discrimination in police

[22] In *Castaneda* v. *Partida*, *supra*, of the 79.1 percent Mexican Americans in the general population only 39 percent were summoned for grand jury duty over an 11 year period; *Turner* v. *Fouche*, 396 U.S. 346 (1970) (60 percent Negroes in the total population, only 37 percent on the grand jury lists). *Whitus* v. *Georgia*, 385 U.S. 545 (1967) (21.7 percent Negroes in the general population, only 9.1 percent on grand jury venire).

[23] In Fyfe, Blind Justice: Police Shootings In Memphis, 73, Crim. L. & Criminology 707 (1982), one alternative explanation for the great volume disparity in the number of black shooting victims compared with whites is that police practice a policy of using "one trigger finger for whites and another for blacks". *Id.* at 708. Racism, as encouraged by officers and administrators, results in "shooting blacks in situations which they would ordinarily refrain from shooting whites" *Id.*

homicides. However, the equal protection claim in *Garner*, buttressed by City and Nationwide data serve to show that the Tennessee policy was racially motivated.

ARGUMENT II

A State Statute Allowing Law Enforcement Officers to Shoot Fleeing Felon Suspects, Whom the Officers Reasonably Assume to Be Unarmed and Engaged in Non-Violent Property Crimes, Violate the Suspects' Due Process of Law.

Appellee correctly asserted that the Due Process Clause of the Fourth Amendment prohibits police officers from using deadly force to arrest an unarmed person suspected of committing a non-violent property crime.[24] Relying on *Terry* v. *Ohio*, 392 U.S. 1 (1968) and *Jenkins* v. *Averett*, 424 F.2d 1228 (4th Cir. 1970), the Sixth Circuit Court of Appeals found that the method of applying deadly force to secure the arrest and seizure of a nonviolent fleeing felon by police constituted an unreasonable seizure of young Garner.

Unlike in the case at bar, the defendant in *Terry* v. *Ohio* had a concealed weapon and sought to have the same suppressed. Terry argued that since he was not engaged in

[24] It has been suggested that the 4th Amendment due process test is easier to apply than the 14th Amendment test because it eliminates inquiries into compelling state interests, and produces the same results. Under this test the suspect's fundamental right to life is of paramount importance, and an officer may only use deadly force to protect the safety of the public or in self-defense. *See Note, Tennessee Code Section 40-7-108 authorizing the use of deadly force by police officers against an unarmed suspect of a nonviolent felony is unconstitutional under the Fourth and Fourteenth amendments—Garner* v. *Memphis Police Department*, 710 F.2d 240, 52 Univ. Cin. L. Rev. 1155, 1168 (1983); *See also* Note, *The Unconstitutional Use of Deadly Force Against Nonviolent Fleeing Felons: Garner* v. *Memphis Police Department*, 18 Georgia L. Rev. 137 (1983).

sonable under the circumstances concluding the act of fleeing from the scene of the burglary constituted a continuous commission of the burglary. *See also* the concurring opinion of Judge McCree in *Wiley, supra*, at 1256.

During 15th Century England and 18th Century America, law enforcement officers were widely permitted to use deadly force in arresting a felony suspect because all felonies were punishable by death;[25] therefore, "the use of deadly force was seen as merely accelerating the penal process" without the inconvenience of a trial.[26]

The 18th Century American view of the common law rule was weakened in the second half of the 19th Century because although the number of crimes classified as felonies increased, the number of capital punishment crimes decreased.[27] Thus, as of 1976, in the twenty odd states who codified the common law deadly force rule, police officers, were authorized to use deadly force in many more situations than was authorized at common law.[28] Consequently, boys like Garner who may have ordinarily received a minimum sentence term or probation are facing the maximum sentence of death without a judge or jury. More than thirty states have already recognized the injustices of the common law deadly force rule, and the Sixth Circuit should be applauded for doing the same in Tennessee.

In *Rochin* v. *People of California*, 342 U.S. 165 (1951), this Court was faced with whether the sheriffs violated

---

[25] Comment, *Deadly Force to Arrest: Triggering Constitutional Review*, 361, 11 Harv. C.V. R.—Civ.L. L. Rev. at 365. Felonies include murder, rape, manslaughter, robbery, sodomy, mahem, burglary, arson, prison break, and larceny.

[26] *Id.*, at 365.

[27] *Id.*, at 366; *See also* W. LaFave & A. Scott, Handbook on Criminal Law §56 (1972) (Because a number of felonies are no longer punishable by death, the police officers' right to use deadly force should be limited).

[28] *Id.*, at 368, 366.

any criminal activity the police had no reason to arrest and search him on the suspicion of being an armed and dangerous character. *Id.* at 9. Yet, although confirming Terry's conviction, this Court still maintained the proposition that the Constitution forbids unreasonable searches and seizures.

When the arresting officer proceeded to apprehend young Garner to effect an arrest, it was incumbent upon the officer to act in a reasonable manner. An arrest is no less than a "seizure" of the person, *United States* v. *Watson*, 423 U.S. 408 (1976); therefore, arrestees are entitled to the protection of the Fourth Amendment against unreasonable seizures of their persons. *See Terry* v. *Ohio, supra; Cupp* v. *Murphy*, 412 U.S. 216 (1973). To kill an apparently unarmed person just to insure that he does not walk away is a method "unique in its severity and irrevocability." *Garner* v. *Memphis Police Dept.*, 710 F.2d at 243, quoting *Gregg* v. *Georgia*, 428 U.S. 153, 187 (1976). In the case at bar, the police officer, by his own testimony, confessed that he believed young Garner not to be armed, yet he shot Garner in the head because Garner was running to climb a fence in an attempt to get away. Surely, the police officer and his companion officer could have used a reasonable manner of apprehending young Garner short of seizing the boy's life.

The Tennessee Fleeing Felon Statute, Tenn. Code Ann §40-7-108, which the Sixth Circuit ruled unconstitutional, clearly gave police officers complete discretion to use deadly force against any and all felons to effect an arrest. Ruling that Tennessee's Fleeing Felon Statute is unconstitutional was not something done blindly by the Sixth Circuit, nor was it the first time the statute came before that Court or any other Court.

In *Wiley* v. *Memphis Police Dept.*, 548 F.2d 1247, 1253 (6th Cir. 1977), based in part on the fact that guns were found nearby, the court found the use of deadly force rea-

the accused's right to due process when the sheriffs, having some information that the accused was selling narcotics, entered an open door to the dwelling, forced open the door to the accused's bedroom and forcibly attempted to extract capsules from the accused's mouth; and when that didn't work, directed a doctor to pump the accused's stomach against the accused's will and therefrom extracted two capsules containing morphine. *Id.* at 206. In looking at the Due Process question, this Court acknowledged that the administration of criminal justice is predominantly committed to the care of the States. *Id.* at 168. However, this Court further went on to say that

> "the requirements of the Due Process Clause" inescapably imposes upon the Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses. *Id.* at 169, citing *Malinsky* v. *New York*, 324 U.S. 401, 416-417 (1945).

In the case at bar, to uphold the constitutionality of the common law deadly force statute would be sanctioning questionable police policies and tactics that not only result in honest mistakes, but deliberate violations of the right to human life. Chief Justice Burger's dissent in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, was well taken when he said

> I wonder what would be the judicial response to a police order authorizing "shoot to kill" with respect to every fugitive. It is easy to predict our collective wrath and outrage. We, in common with all rational minds, would say that the police response must relate to the gravity and need: that a "shoot" order might conceivably be tolerated to prevent the escape of a convicted killer but surely not for a car thief, a pickpocket or a shoplifter. 403 U.S. 388, 411 (1971).

The Court has stated that "it would be a stultification of the responsibility which the Court of constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind, but can extract what is in his stomach. *Rochin, supra*, at 173. Yet, would it not be a greater stultification for this Court to say an unarmed person cannot be sentenced to death for committing a nonviolent property crime by a judge or jury, but that same person can be killed, and in effect sentenced to death, for running from the scene of a nonviolent property crime by a police officer even though the fleeing victim was not placing anyone's life in danger, but, apparently, his own.

Therefore, justice dictates that this Court affirm the Sixth Circuit Court of Appeals holding that the Tennessee Statute as well as other state common law statutes on deadly force, violates the Due Process Clause of the Constitution, and is, therefore, unconstitutional.

CONCLUSION

It is respectfully submitted that the judgment of the Sixth Circuit Court of Appeals should be affirmed.

Florida Chapter of the National
Bar Association
on behalf of
The National Bar Association

Prepared by:

Pamela A. Brown, Esq.
1399 Hendren Drive
Orlando, Florida 32807
305 277-3287

Evett L. Simmons, Esq.
380 S.Campbell Street
Daytona Beach, Florida 32014
904 255-6573

REPLY

BRIEF

Supreme Court, U.S.
FILED
OCT 19 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1035

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF TENNESSEE,
Appellant,

vs.

CLEAMTEE GARNER,
Appellee.

On Appeal from the United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF OF THE APPELLANT

W. J. MICHAEL CODY
Attorney General & Reporter
State of Tennessee

JERRY L. SMITH
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219-5025
(615) 741-6439

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

TABLE OF CONTENTS

Page

Argument:

I. Universal Acceptance Of The Common-Law Rule Respecting The Use Of Deadly Force To Arrest At The Time Of Adoption Of The Fourth Amendment Is Of Particular Relevance In Determining The Reasonableness Of A Seizure Under The Fourth Amendment 2

II. The Appellee Is Asking The Court To Announce A Constitutional Doctrine Where Judicial Restraint Is Counselled 3

III. Section 40-7-108 Is Constitutional As Applied To The Facts Of This Case; It Therefore Cannot Be Said To Be Facially Unconstitutional . 6

Conclusion 9

TABLE OF AUTHORITIES

Cases Cited:

Camara v. Municipal Court, 387 U.S. 523, 539 (1967) .. 3

Cunningham v. Ellington, 323 F.Supp. 1072 (W.D. Tenn. 1971) 3,4

Duncan v. Louisiana, 391 U.S. 145, 159 (1968) 7

Furman v. Georgia, 408 U.S. 238, 383 (1972)..... 6

Garner v. Memphis Police Department, 600 F.2d 52, 54 (6th Cir. 1979)..... 6

Human v. Goodman, 159 Tenn. 241 (1929) 8

State Statutes and Regulations:

Tennessee Code Annotated § 39-3-401 7

Tennessee Code Annotated § 40-7-108 1,2,6,8

Other Authorities:

American Law Institute's Model Penal Code
Section 3.07 5

Section 3.07(2)(b) 4,5

Section 3.07(3) 4

Restatement of Torts Section 131 5

Jones v. Marshall, 528 F.2d 132, 142 (2d Cir. 1975) 4

Love v. Bass, 145 Tenn. 522 (1921) 8

Marshall v. Barlow's, Inc., 436 U.S. 307, 315-316 (1978) 3

Martin v. Schnarr, 547 F.2d 1007, 1021 (8th Cir. 1976) .. 3,4

Payton v. New York, 445 U.S. 573, 591 (1980) 2,3

Reneau v. State, 70 Tenn. 720 (1879) 8

Roe v. Wade, 410 U.S. 113, 177, 178 9

Scarborough v. State, 168 Tenn. 106 (1934) 8

Solem v. Helm, 103 S.Ct. 3001, 3023 (1983) 7

State v. Boles, 598 S.W.2d 821 (Tenn. Crim. App. 1980) 8

State v. Dunn, 282 S.W.2d 203 (Tenn. App. 1943) 8

Taylor v. State, 157 Tenn. 421, 426 (1928) 8

Village of Hoffman Est. v. Flipside, Hoffman Est., 455 U.S. 489 (1982) 9

Whalen v. Roe, 429 U.S. 589, 597 (1977) 6

Wiley v. Memphis Police Department, 548 F.2d 1247 (6th Cir. 1977) 3,4

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 9

Federal Statutes and Regulations:

Act of April 30, 1790, Ch. IX, 1 Stat. 112 3

No. 83-1035

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF TENNESSEE,
Appellant,

vs.

CLEAMTEE GARNER,
Appellee.

On Appeal from the United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF OF THE APPELLANT

This case involves the constitutionality of Tennessee Code Annotated Sec. 40-7-108, which provides:

> *Resistance to officer.*—If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest.

At issue is whether this statute is constitutionally invalid because it permits police officers to use deadly force as a last resort to effect the apprehension of a fleeing felony suspect in the absence of probable cause on the part of police to believe the suspect is dangerous or has committed a violent crime. The District Court found the statute was not unconstitutional and that the wisdom

of the State's deadly force policy is one properly left to the legislature. The Court of Appeals, however, reversed the District Court and held the statute unconstitutional on its face under the Fourth and Fourteenth Amendments to the United States Constitution because the statute was not drawn so as to permit the use of deadly force as a last resort to arrest only upon a finding by police of probable cause to believe the fleeing suspect was dangerous or had committed a violent crime.

The issue presented to the Court in this appeal is whether Tennessee Code Annotated Sec. 40-7-108 is constitutional under the Fourth and Fourteenth Amendments to the United States Constitution.

I. Universal Acceptance Of The Common-Law Rule Respecting The Use Of Deadly Force To Arrest At The Time Of Adoption Of The Fourth Amendment Is Of Particular Relevance In Determining The Reasonableness Of A Seizure Under The Fourth Amendment.

Appellee suggests the curtailment of the death penalty for all felonies except murder under special aggravating circumstances, and the development of modern technology in the law enforcement area renders the common-law rule respecting the use of deadly force to arrest unreasonable. Certainly, the Fourth Amendment is not static in its application; however:

> An examination of the common-law understanding of an officer's authority to arrest sheds light on the obviously relevant if not entirely dispositive, consideration of what the Framers of the [Fourth] Amendment might have thought to be reasonable.

Payton v. New York, 445 U.S. 573, 591 (1980).

At the time of the adoption of the Fourth Amendment, the common-law rule respecting the use of deadly force was universally recognized. Appellee's suggestion that this was so only because felonies were punishable by death at the time is refuted

by the fact that the penal statute enacted by the First Congress created certain felonies in addition to those at common-law and made many of those felonies punishable by a term of imprisonment rather than by death. *See*, Act of April 30, 1790, ch. IX, 1 Stat. 112. Although a number of states have legislatively moved to a more restrictive deadly force policy than the common-law rule, and a few have judicially created a more restrictive privilege, the common-law rule remains widespread among the states. The attitudes of many judges who have considered the question of the constitutionality of the common-law rule in recent years regarding its necessity and viability would indicate the rule is not so out of balance with contemporary norms and conditions that it should be jettisoned as violative of the Constitution. *See, e.g., Wiley v. Memphis Police Department*, 548 F.2d 1247 (6th Cir. 1977); *Mattis v. Schnarr*, 547 F.2d 1007, 1021 (8th Cir. 1976) (Gibson, C.J., dissenting); *Cunningham v. Ellington*, 323 F.Supp. 1072 (W.D. Tenn. 1971) [Three (3) Judge Panel].

The ultimate test under the Fourth Amendment is one of "reasonableness." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 315-316 (1978); *Camara v. Municipal Court*, 387 U.S. 523, 539 (1967). The common-law rule respecting the use of deadly force to arrest has for centuries, and until the present day been thought by many states to be "reasonable" in accommodating effective law enforcement with the rights of criminal suspects. The Court should refrain from declaring as unreasonable "a practice which has been thought entirely reasonable by so many for so long." *See, Payton v. New York, supra*, at 620 (White, J., dissenting) (dealing with warrantless home arrests).

II. The Appellee Is Asking The Court To Announce A Constitutional Doctrine Where Judicial Restraint Is Counselled.

The appellant submits that the instant case presents a situation where judicial restraint is cautioned. Indeed, this has been the approach of most judges who have considered the question of the constitutionality of the common-law rule respecting the

use of deadly force to arrest. As the Second Circuit Court of Appeals wrote in upholding Connecticut's codification of the common-law rule:

> This would seem peculiarly to be one of those areas where some room must be left to the individual states to place a higher value on the interest in this case of peace, order, and vigorous law enforcement, than on the rights of individuals reasonably suspected to have engaged in the commission of a serious crime.

Jones v. Marshall, 528 F.2d 132, 142 (2d Cir. 1975) (per Oakes, J.).

Implicit in the *Jones* case, the dissent in *Mattis v. Schnarr*, *supra*, the holding in *Wiley v. Memphis Police Department*, *supra*, and the holding in *Cunningham v. Ellington*, *supra*, is a recognition that no single principle that seeks to accommodate society's interests with those of the fleeing suspect's is free from contradictions and ironies. Instead, all rules which seek to reach such an accommodation are based upon extremely difficult moral and philosophical choices, which require a balance of values that is singularly suited for legislative rather than judicial resolution.

In this case, appellee asks this Court to affirm the action of the Court of Appeals in essentially adopting the American Law Institute's Model Penal Code Sec. 3.07(2)(b) (Official Draft, 1962) as the constitutional standard for the use of deadly force to arrest. 710 F.2d at 247; (JS. App. A-13, A-14). However, the Court of Appeals adopted this standard without inquiry as to whether other rules on the use of deadly force might not be equally reasonable. There is nothing to suggest that the Model Penal Code was meant to be a constitutional standard. Ironically, while not permitting the use of deadly force to arrest in the instant situation, the Model Penal Code Sec. 3.07(3) (Official Draft 1962), would apparently permit an officer to use deadly force as a last resort to prevent the escape from jail of a person detained awaiting trial on a misdemeanor. In fact, the

American law Institute has not only changed its position over the years, and not always in the direction of a more restrictive rule, but the ALI has simultaneously exposed different rules in different projects. For example, in contrast to Model Penal Code Sec. 3.07(2)(b) respecting an officer's criminal liability for using deadly force, the All's Restatement (second) of Torts, Sec. 131 (1965), adopts the common-law rule respecting the use of deadly force in determining when an officer may be civilly liable. It is apparent the ALI did not arrive at the common-law rule for civil liability without considering other alternatives. In fact, in the first Restatement of Torts Sec. 131 (1934), the use of deadly force was permitted as a last resort to arrest only when the officer is arresting for treason, for felonies normally involving the threat of violence, or for burglary of a dwelling. Thus, the ALI has moved from a more restrictive deadly force policy to the common-law rule in its determination of civil responsibility for the use of deadly force.

The commentators in the area have also disagreed as to the appropriate formulation of a rule respecting deadly force to arrest. Professor Henry Hart of the Model Penal Code Advisory Committee would have declared the use of deadly force to arrest unreasonable unless postponement of arrest would be "contrary to the public interest" because of one or more of some four (4) factors including the officer's knowledge of the suspect's criminal record, the risk of immediate danger the suspect poses, and the degree of probability the suspect cannot be identified and arrested at a later time. *See, Model Penal Code*, Tentative Draft No. 8, Sec. 3.07 at 60 (1958). Professor John Barker Waite provided a cogent defense of the common-law rule in his dissent from the Model Penal Code's restrictive deadly force provisions. *See, Model Penal Code*, Tentative Drafts Nos. 8, 9 and 10, pp. 60-62.

These standards discussed above illustrate the wide variety of rules thought to be reasonable in this area. They also tend to illustrate that the moral and social judgments underlying each

rule should be expressed through the legislative branch of government rather than the judiciary. Sec. 40-7-108 is but a legislative enactment that, as construed by the state courts, exempts an officer from criminal and civil liability under state law for the use of necessary force in making an arrest. Constitutional questions arise concerning the statute in this case only because of the qualified immunity under 42 U.S.C. §1983 defendants might claim in reliance on the privilege the statute grants. *See, Garner v. Memphis Police Department*, 600 F.2d 52, 54 (6th Cir. 1979). Appellee in effect asks this Court to declare this statute to be immoral, unwise, and no longer needed because advances in the technology of law enforcement have reduced the justification for the common-law rule. Appellee's brief at pp. 46-48. Appellant submits, however, that:

> [I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.

Furman v. Georgia, 408 U.S. 238, 383 (1972) (Burger, J., dissenting). State legislation such as that involved in the instant case which may have some effect on individual liberty should not be held unconstitutional because a court finds it unwise or unnecessary in light of modern conditions. The apprehension of persons suspected of crimes is one of vital public concern; as such this Court has recognized the states should have broad latitude in experimenting with possible solutions to such problems. *Whalen v. Roe*, 429 U.S. 589, 597 (1977).

III. Section 40-7-108 Is Constitutional As Applied To The Facts Of This Case: It Therefore Cannot Be Said To Be Facially Unconstitutional.

Appellee suggests this case presents facts which indicated to Officer Hymon that Eugene Garner was at most a suspect fleeing a non-violent crime, one who posed no immediate danger to anyone. Appellee's brief at pp. 31-32. Thus, appellee and the

Court of Appeals suggest the instant case can be equated with one involving an attempt to arrest a shoplifter, a tax evader or a petty thief. Appellee's brief at pp. 50-51; 710 F.2d at 244; (JS. App. p. A-8). Of course, after the shooting it was determined that Garner had not harmed anyone in the burgled house, nor was he armed, but Officer Hymon did not have the benefit of this hindsight while attempting to apprehend Garner. As stated by the District Court:

> The facts of this case did not indicate to Officer Hymon that Garner was "non-dangerous." (Pet. App. p. A-34)

Given the facts of this case as they confronted Officer Hymon, the appellant submits the use of deadly force to apprehend Garner was both reasonable and constitutional.

Burglary is a crime qualitatively different from that of shoplifting, tax evasion or petty thievery. Because of its direct invasion of a place of habitation, burglary of a residence, such as that involved here, has traditionally been placed in the category of one of the most serious of felonies. *See*, City's Brief at pp. 23-26. Four members of this Court have expressed views that burglary is a crime which "cannot fairly be characterized as 'non-violent'." And is, in fact, a crime having "harsh potentialities for violence." *Solem v. Helm*, ___ U.S. ___, 103 S.Ct. 3001, 3023 (1983) (Burger, C. J., dissenting). In Tennessee, the burglary for which Garner could have been convicted, had he been an adult, was first degree burglary, punishable by a term of imprisonment of five (5) to fifteen (15) years. Tennessee Code Annotated Sec. 39-3-401. Apart from the potential for violence involved in a residential burglary at night, the relatively lengthy penalty for the offense in which Garner was engaged indicates compelling interests in the apprehension of burglars. *See, Duncan v. Louisiana*, 391 U.S. 145, 159 (1968) ("[t]he penalty authorized by the law of the locality may be taken 'as a guage of its social and ethical judgments,' of the crime in question.")

Thus, Officer Hymon was faced with a situation of attempting to arrest a suspect fleeing a crime that can be fairly characterized as one where the potential for violence is great, and one that society deems serious enough to punish by lengthy imprisonment. Hymon could not know Garner was not dangerous, nor could he know what Garner had done inside the burgled house. Surely, the state has compelling interests under such circumstances in preventing the escape of the fleeing suspect, and Hymon acted reasonably in using deadly force to prevent Garner's escape when it could not be prevented by any less intrusive means.

Assuming *arguendo* that Sec. 40-7-108 could be construed as facially unconstitutional because it permits police to use deadly force as a last resort to capture known non-dangerous suspects, fleeing crimes not typically regarded as violent, *i.e.*, the shoplifter, tax evader, or petty thief, that is not the situation in this case. Indeed, that question might never arise. Although the Tennessee courts have recognized the common-law rule respecting the use of deadly force to arrest, the state courts have actually sustained the privilege only in one case which involved a dangerous felony. *Love v. Bass*, 145 Tenn. 522 (1921) (suspect attempted to run down sheriff with automobile). In *Scarborough v. State*, 168 Tenn. 106 (1934), the privilege was not accepted as a defense to manslaughter prosecution for the shooting of a fleeing automobile thief not shown to be reasonably necessary. The cases of *Johnson v. State*, 173 Tenn. 134 (1938); *Human v. Goodman*, 159 Tenn. 241 (1929); *Reneau v. State*, 70 Tenn. 720 (1879); *State v. Boles*, 598 S.W.2d 821 (Tenn. Crim. App. 1980); *State v. Dunn*, 282 S.W.2d 203 (Tenn. App. 1943), all dealt with arrests for misdemeanors and thus declined to sustain a defense based on the common-law privilege. Interestingly, the Tennessee Supreme Court has indicated the common-law privilege to use deadly force might not be extended to an officer who intentionally shoots to kill a nonviolent person reasonably suspected of committing only a minor felony. *See, Taylor v. State*, 157 Tenn. 421, 426 (1928).

The appellant submits this case presents a scenario where the statute can be constitutionally applied. This Court has not made a practice of striking down statutes as a whole, when circumstances could exist where the statutes may be constitutionally applied. *See, Village of Hoffman Est. v. Flipside, Hoffman Est.*, 455 U.S. 489 (1982) (pre-enforcement challenge); *Roe v. Wade*, 410 U.S. 113, 177, 178 (Rehnquist, J., dissenting); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (statute unconstitutional as applied).

CONCLUSION

For the reasons set forth above, and in the initial brief, the appellant respectfully requests that the decision of the Sixth Circuit Court of Appeals be reversed.

Respectfully submitted,

W. J. MICHAEL CODY
Attorney General and Reporter

JERRY L. SMITH
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219-5025
(615) 741-6439